Ontario

# Commission on Freedom of Information and Individual Privacy

# Securities Regulation and Freedom of Information



Research Publication 8

# SECURITIES REGULATION AND FREEDOM OF INFORMATION

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## FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of government information;

3. The categories of government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 8. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn in having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The present paper is one of a series of studies conducted by the Commission's research staff and its consultants, which together offer an account of the existing information policies and practices of a number of agencies of the Ontario government, and which explore the possibilities for expanding the current level of citizen access to government information.

Two of these studies, Professor Connelly's study of securities regulation and Professor Ison's study of the Workmen's Compensation Board (Research Publication 4, January 1979) describe in some detail the information practices of a specific Ontario government agency. Other Commission studies have examined current procedures and problems associated with specific information types -- such as personal information or information generated in the course of policy-making activity -- and have therefore attempted to describe and assess practices relating to the information type in question across a broad range of governmental organizations.

The rationale for the two studies of specific agencies is to act as a corrective to these more generally conceived inquiries. It was hoped that a more sophisticated appreciation of information access problems would emerge through a detailed consideration of the entire range of information practices of an individual agency. The agency's current practice and its problems could be viewed in the light of its overall institutional design, the full range of its contacts with the various segments of the public which it serves, and a clear understanding of the public policy objectives which it has been designed to accomplish.

The Connelly and Ison studies are usefully complementary. Our more general inquiries have suggested that the two most difficult information access problems arising out of the administrative process relate to the disclosure of personal information about individual citizens and the disclosure of valuable financial or commercial information relating to the affairs of business corporations and other commercial entities. Professor Ison's paper provides us with an opportunity to consider with some care the problems associated with the handling of personal information. Professor Connelly's study describes and assesses the information practices of an agency, the Ontario Securities Commission, that handles a high volume of sensitive commercial and financial information.

Professor Connelly's study possesses the additional virtue of examining an agency whose activities are roughly analogous to those of a major American federal administrative agency, the Securities and Exchange Commission, that is subject to the American Freedom of Information Act. Professor Connelly was therefore asked to examine the operation of the American statute and its impact on the activities of the SEC, with a

view to identifying problematic aspects of the application of a freedom of information scheme to information gathered in the course of securities regulation.

Professor Connelly is an Associate Professor of Law at Osgoode Hall Law School, York University. His professional interests and experiences suit him well for the present task. Since joining the faculty at Osgoode, Professor Connelly has taught courses relating to the law of securities regulation and the regulation of competition. He has also published a number of journal articles related to these subjects. Prior to joining the Osgoode faculty, Professor Connelly was a staff counsel at the Securities and Exchange Commission in Washington. This paper thus presents an unusual phenomenon in comparative studies of this kind; it has been written by an author whose experience and expertise embraces both of the jurisdictions under examination.

It should be pointed out that the interviews undertaken by Professor Connelly with members of the Staff of the Ontario Securities Commission occurred during the late summer and early fall of 1978. Accordingly, it is possible that the practices of the Commission have evolved since that time from those described in this paper.

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. Those who wish to communicate their views in writing to the Commission are invited to address their comments to: Registrar, Commission on Freedom of Information and Individual Privacy, 22nd Floor, 180 Dundas Street West, Toronto, Ontario M5G 1Z8.

It should be emphasized that the views expressed in this paper are those of the author, and that they deal with questions on which the Commission has not yet reached a final conclusion.

Particulars of other research papers published to date by the Commission are to be found on page 170.

John D. McCamus
Director of Research

SECURITIES REGULATION
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## INTRODUCTION*

The Commission on Freedom of Information and Individual Privacy has asked the writer to prepare a paper on securities regulation and freedom of information; in particular, how freedom of information legislation might impact upon the operations of the Ontario Securities Commission [hereafter "OSC"], one of the province's more prominent administrative agencies. The OSC was selected by the Commission for special attention not only because of the inherent importance of its work in the functioning of the provincial — and indeed national -- economies but also because of ready comparability between the work of the OSC and that of the Securities and Exchange Commission [hereafter "SEC"] in the United States, an agency subject to freedom of information legislation of a fairly strong type.

The plan of the paper is, first, to describe the current information gathering functions of the OSC and its policies on public disclosure, then to describe in some detail the American Freedom of Information Act and the operations of the SEC as they relate to that Act, and finally to discuss how freedom of information legislation

* The writer wishes to acknowledge the full and generous cooperation of members and senior staff of the Ontario Securities Commission in the research for this paper. The writer is exclusively responsible for opinions expressed as well as for any errors in presentation.

would be likely to call for changes in the present disclosure policies and practices of the OSC.

In at least one important respect the OSC is highly atypical of Ontario government agencies with respect to freedom of information. A prime mechanism of the Ontario Securities Act in furthering its purpose of protection of investors is public disclosure of information concerning issuers of securities. The OSC therefore can be said without exaggeration to be in the business of promoting disclosure -- disclosure about the affairs of securities issuers, although not necessarily about its own affairs. The prospectus, of course, is the most traditional disclosure device of securities regulation. Under the new Ontario Securities Act,[1] slated to become effective in 1979, the pivotal role of disclosure in the regulatory scheme will be even more emphasized than at present. The obligations of securities issuers to make public disclosure of their affairs at times other than when making a new issue of securities will be increased and, as a practical matter, the marketability of an issuer's securities will depend in many instances upon the issuer being in full compliance with its obligations to make continuous disclosure.

1 Bill 7, The Securities Act, 1978, 31st Leg., 2nd Sess. (3rd Reading, June 23, 1978).

The writing of this paper (and, unfortunately, the reading of it) is complicated by the fact that as of the time of writing (late 1978) we are almost literally between two statutes. For convenience, the Ontario Securities Act as now in effect,[2] and under which the OSC's practices to date with regard to disclosure have been formulated, is referred to in text and notes as "the Securities Act" or "the Act" while the statute that is expected to be proclaimed in force sometime in 1979 is referred to as "Bill 7". Each time the legislation is specifically referred to in the text parallel citations to the relevant sections of the Act and the Bill will be footnoted. Although very many sections of the Bill make small changes in wording from the corresponding provisions of the Act, only changes of special relevance to the particular matter under discussion will be noted.

2 R.S.O. 1970, c. 426, as amended by S.O. 1971, c. 31; S.O. 1972, c. 1; and S.O. 1973, c. 11.

CHAPTER I

## THE PRINCIPAL INFORMATION-GENERATING ACTIVITIES OF THE ONTARIO SECURITIES COMMISSION

The Ontario Securities Act regulates securities markets within the province in five major ways. First, it imposes upon persons and firms that propose to issue securities to the public the obligation to file with the OSC[3] and generally to distribute to purchasers[4] a prospectus containing "full, true and plain disclosure" concerning the affairs of the issuer and the proposed use of the funds to be raised from the issue.[5] Second, in general the Act imposes a licensing requirement on persons who trade in securities on other than an occasional basis,[6] or who underwrite new issues of securities,[7] or who give advice with respect to the merits of investing in securities.[8] Third, the Act imposes on certain issuers of securities various obligations to

3 Securities Act, s. 35(1); Bill 7, s. 52(1).

4 Securities Act, s. 64(1); Bill 7, s. 70(1).

5 Securities Act, s. 52(1); Bill 7, s. 57(1).

6 Securities Act, s. 6(1)(a)-(c); Bill 7, s. 24(1)(a).

7 Securities Act, s. 6(1)(d); Bill 7, s. 24(1)(b).

8 Securities Act, s. 6(1)(e); Bill 7, s. 24(1)(c).

make continuous disclosure concerning their affairs both on a regular, periodic basis[9] and when certain particularly noteworthy events in the issuers' businesses take place.[10] Fourth, the Act attempts by the imposition of civil damage liabilities[11] and reporting requirements[12] to discourage the practice of insider trading: the trading in securities by persons having a close relationship to the issuer thereof when such persons are in possession of material information concerning the

9 Securities Act, ss. 120, 130; Bill 7, ss. 76, 77.

10 Such as making a take-over bid for the securities of another issuer. See Securities Act, ss. 83, 86; Bill 7, ss. 92, 94. Under Bill 7, s. 96, a communication from the directors of the target company to its shareholders will also become mandatory. Bill 7 will also mandate take-over bid-type disclosures to be sent to shareholders where an issuer bids for its own shares. Bill 7, ss. 92, 95.

Under Bill 7, s. 74, generally an issuer will be obligated to issue a press release describing any "material change" in its affairs "forthwith" upon the occurrence of the change, except that under certain circumstances disclosure could be made to the Commission alone on a confidential basis. "Materiality" is defined in s. 1(1)21 of the Bill in terms of events likely to have a significant effect on the market price of the issuer's securities. The statutory reporting obligation codifies the present Uniform Act Policy No. 2-12. The underlying purposes of mandatory disclosure are to promote a fully informed and therefore "efficient" marketplace and, concomitantly, to reduce the possibilities for insider trading. See infra and In the Matter of Harold P. Connor (National Sea Products Ltd.), [1976] OSC Bulletin 149.

11 Securities Act, s. 113; Bill 7, s. 131.

12 Insiders of an issuer, as defined by the statute, must disclose their initial holdings of the issuer's securities as well as all changes therein. Securities Act, s. 110; Bill 7, s. 102.

issuer's affairs that has not been disclosed to the marketplace generally.[13] Finally, the Act gives to the OSC oversight responsibilities with respect to the Toronto Stock Exchange,[14] the principal market for secondary trades in securities in the province.

The Act gives to the OSC extremely broad powers of investigation in furtherance of all of its more specific regulatory responsibilities.[15]

Many of the OSC's specific regulatory activities generate from sources external to the Commission very substantial amounts of documentary information.

13 Under the present Act, insider trading is not prohibited; it gives rise to civil liabilities only. Under Bill 7, s. 75 it will not only give rise to civil liabilities but will attract the quasi-criminal sanction of s. 118, which prescribes a fine of up to $2,000 and up to one year imprisonment for a contravention of the Act or the regulations under it. The conduct that is prohibited and that creates civil liability, however, is "making use of" material undisclosed information and not just trading securities with knowledge of it. On the distinction see F.H. Buckley, "How to Do Things With Inside Information" (1978), 2 Can. Bus. L. J. 343.

14 Securities Act, s. 140; Bill 7, s. 22.

15 Securities Act, ss. 21-28; Bill 7, ss. 11-17.

A. Issuer Filings

For example, the prospectus provisions actually contemplate two filed documents: the preliminary prospectus and the final prospectus or, simply, the prospectus. A preliminary prospectus usually contains all of the information that will be in the final prospectus except for the report of the auditors on the financial statements and the offering price of the securities and other information dependent upon the offering price. Forthwith upon the filing of the preliminary prospectus, the Director will issue a receipt therefor.[16] The preliminary prospectus is used by the underwriters as a selling document for the purpose of soliciting interest in the securities among prospective purchasers, especially institutional purchasers, pending the actual offering of the securities, which does not occur until a final prospectus has been filed and a receipt issued therefor. The issuance of a receipt for the final prospectus is discretionary.[17] Between issuance of a

16 Securities Act, s. 35(2); Bill 7, s. 54. The Director is the Commission's top-ranking staff person.

17 Securities Act, s. 61; Bill 7, s. 60. The Director will not issue a receipt for the final prospectus if it fails to comply with the form and content laid out in the Act, the regulations and the forms prescribed under the Act, if it fails to make full, true and plain disclosure of all material facts concerning the issuer, or for various other reasons specified in s. 61. In addition, the Commission has held that the Director has a discretion not to issue a prospectus receipt where he is of the view that, notwithstanding full disclosure
(cont'd)

receipt for the preliminary prospectus and the receipt for the final prospectus, the Deputy Director-Filings will notify the issuer and its counsel of any shortcomings in the preliminary prospectus. This notification is called in the trade a "deficiency letter". There may then follow an exchange of correspondence between the Commission staff and the issuer's counsel and, very often, meetings and telephone calls between them. The issuer will either remedy the deficiencies as perceived by the Deputy Director or will attempt to convince him that there is in fact no deficiency. In any event, in the course of bringing a given issue of securities to the public marketplace there is likely to be a substantial process of give and take between Commission staff, on the one hand, and the issuer and its counsel, on the other. Frequently the underwriter and the auditors may be involved too. Some of this process may take the form of correspondence; the oral part may be memorialized. Ultimately, though, only the preliminary prospectus and the final prospectus will appear in the Commission's public file on a given issuer. In addition, of course, those two documents, particularly

17 (cont'd) made in the prospectus, the risk of loss to prospective security purchasers is excessive. In the Matter of Shoppers Investments Ltd., [1972] OSC Bulletin 215; In the Matter of New Hiawatha Gold Mines Ltd., [1976] OSC Bulletin 82; In the Matter of Mosport Film Productions (1978) [1978] OSC Bulletin 349. The existence of such a broad discretion is confirmed by the wording of s. 60(1) of Bill 7 which provides that: "...the Director shall issue a receipt for a prospectus ... unless it appears to him that it is not in the public interest to do so".

the final prospectus, will have been given a broad public distribution by the underwriter and the selling group in the course of the issue.

A prospectus for a new issue of securities is a one-shot document. It is a useful description of the issuer for only so long as the issuer's affairs do not undergo material change. The prospectus format has been strongly criticized as presenting information in an excessively dry, verbose and legalistic manner that does not make for effective communication.[18] It is highly doubtful that individual, as opposed to institutional, investors read the prospectus at all.[19] Yet the theory behind many of the exemptions from the prospectus requirement for a new issue of securities is that the institutions do not need the protections of a prospectus anyway.[20] Still, however, the prospectus requirement can be a significant investor protection device. The preliminary prospectus will be pored over on a word-for-word basis by the underwriter, who may suffer a very substantial loss if the

18 See for example, H. Kripke, "The SEC and the Accountants: Some Myths and Some Realities", (1970) 45 N.Y.U.L. Rev. 1151.

19 Indeed the mechanics of the prospectus distribution process are such that in most cases, an individual investor in a new issue of securities will not receive the prospectus until after he has placed his order for the securities. See Securities Act, s. 64; Bill 7, s. 70.

20 E.g., Securities Act, ss. 58(1)(a), (b); Bill 7; ss. 71(1)(a), (c).

issue is not sold and who under Bill 7 may be subjected to substantial civil damage liabilities if the issue is sold and the prospectus turns out to have contained a material falsity.[21] The preliminary prospectus is examined carefully by the Commission staff, by members of the underwriter's selling group, by brokers generally and by institutional investors to whom the document will have been distributed to solicit their interest in purchasing part of the proposed issue.[22] If any one of those groups do not like what they see, then the issue may not go forward. Therefore the prospectus provisions may well be said to "work" even though the prospectus is read only by investment sophisticates and not by the general investing public -- protection of whose interests supposedly calls for a prospectus in the first place.

In any event, the perceived inadequacies of the prospectus in providing total disclosure have resulted in something of a shift in the last 15 years or so in securities legislation toward reliance upon a notion of "continuous disclosure".[23] Continuous

21 Bill 7, s. 126.

22 Once a receipt has been issued for the preliminary prospectus, it is permissible "to solicit expressions of interest from a prospective purchaser" if a copy of the preliminary prospectus is simultaneously delivered to such prospective purchaser. Securities Act, s. 36; Bill 7, s. 64.

23 The historical development in the U.S. and Canada of the continuous disclosure philosophy is detailed in H.G. Emerson, "An Integrated Disclosure System for Ontario Securities Legislation", in Studies in Canadian Company Law, v. II, J.S. Ziegel ed. (Toronto: 1973).

disclosure documents are filed with the OSC by issuers of securities and sometimes by persons associated with those issuers. They are publicized by the Commission and often by the issuer as well. They are of benefit principally to the secondary trading markets.

The annual audited financial statements that must be filed with the OSC[24] must, under the corporations statutes, be laid before shareholders at the annual meeting[25] and are in fact mailed out to shareholders and to members of the securities industry as part of the company's annual report. Interim unaudited financial reports that must be filed on a six-month basis[26] are made available routinely to the securities industry. Interim financial reports of the larger issuers are followed by the press and some public companies mail them to shareholders. An issuer's interim reports as well as its annual, audited financial statements are part of its public file maintained at the OSC's offices.

24 Securities Act, s. 120; Bill 7, s. 77.

25 E.g., Ontario Business Corporations Act, R.S.O. 1970, c. 53, s. 172, as amended by S.O. 1972, c. 138, S.O. 1974, c. 26. Canada Business Corporations Act, S.C. 1974-75, c. 33, s. 153.

26 Securities Act, s. 130. Under Bill 7, s. 76 interim financial reporting for all issuers except mutual funds will be on a quarterly rather than semi-annual basis.

Take-over bid circulars[27] and information circulars in connection with proxy solicitation are mandated by the Securities Act.[28] Although they are not "filed" with the OSC, they are by their nature public since they are distributed to securities holders in connection with decisions to be taken by the securities holders. The insider trading reports that must be filed with the Commission by officers and directors of issuers[29] are part of the issuer's public file at the Commission and are summarized in the monthly bulletins published by the Commission.

The licensing process also generates very substantial quantities of documentary information. The application forms for registration as securities salesmen and the form to be completed by partners, officers and directors of firm registrants asks for detailed physical characteristics, a detailed 15-year employment history, and the record of the applicant and any associate of the applicant in any other licensed occupation anywhere in the world. The applicant must respond to questions asking, inter alia, whether he or she or any associate has ever "been charged, indicted or convicted under the law of any province, state or country, excepting minor traffic

27 Securities Act, s. 86(1); Bill 7, s. 94(1).

28 Securities Act, s. 103; Bill 7, s. 85.

29 Securities Act, s. 110; Bill 7, s. 102.

violations"; been a defendant or respondent in any civil court proceedings in which fraud was alleged; been declared a bankrupt or made a voluntary assignment in bankruptcy; or been refused a fidelity bond. The application form asks about allegations of wrongdoing and is not limited to judicial findings thereof. While the word "associate" is not defined on the forms, it is defined in the Act to include any spouse, son or daughter of the person and any relative of the person having the same home as such person.[30] The reach of the compulsory disclosure called for by the application form is therefore broad indeed. In addition to information concerning the applicant provided by the applicant and by referees whose names he or she submits, the Deputy Director-Registrations will ask for a police check on the applicant from the RCMP and other police departments, and the Deputy Director also has wide contacts in the financial and regulatory communities that he can check out on an informal basis for information concerning an applicant. Applications for registration are non-public and even the applicant is prohibited access to his or her own file, apart from the information that he or she has submitted.

30 Securities Act, s. 1(1)2; Bill 7, s. 1(1)2.

B. Investigations

The powers of investigation that the Act confers upon the OSC are extremely -- if not to say extravagantly -- broad.[31] The Commission "may, by order, appoint any person to make such investigation as it considers expedient for the due administration of this Act or into any matter relating to trading in securities, and in such order shall prescribe the scope of the investigation".[32] The person appointed to make the investigation has the same power to summon witnesses to give evidence under oath and to produce documents "as is vested in the Supreme Court for the trial of civil actions".[33] A person giving evidence at an investigation may be represented by

31 They have survived constitutional attack. Re Williams and Williams and Mid-Erie Acceptance Corp., [1961] O.R. 657 (C.A.). See generally, J. Baillie, "Discovery-Type Procedures in Securities Fraud Prosecutions" (1972), 50 Can. Bar Rev. 496.

32 Securities Act, s. 21(2); Bill 7, s. 11(2). The structure of the section, which has not been changed between the Act and the Bill, is peculiar since subsection (1) confers a somewhat narrower power upon the Commission to order an investigation "where upon a statement made under oath it appears probable ... that any person or company has contravened" the Act or the regulations or has "committed an offense under the Criminal Code in connection with a trade in securities". The broader subsection would appear to make the narrower one otiose. The Minister (of Consumer and Commercial Relations) also has a broad, but so far never used, power to order an investigation. Securities Act, s. 23; Bill 7, s. 13.

33 Securities Act, s. 21(4); Bill 7, s. 11(4).

counsel,[34] but neither the statute nor the OSC's practice permits any person to be represented by counsel when any other person is giving evidence.[35] In short, the "target" of the investigation, assuming that such a person or company can be identified,[36] has no right to counsel in an investigation apart from the right of a natural person to be represented by counsel when he or she is giving evidence. This has been held not to violate the requirements of natural justice.[37] Furthermore, OSC investigations are not subject to the requirements of the Statutory Powers Procedure Act,[38] which in general codifies natural justice requirements for agency proceedings subject to it.

Section 24 of the Act provides that no person shall disclose to other than his own counsel any information or evidence obtained or

34 Securities Act, s. 21(5); Bill 7, s. 11(5).

35 See C.R. Thomson, "Concepts and Procedures in Hearings Before the Ontario Securities Commission", [1972] L.S.U.C. Special Lectures 95, 99-104.

36 Often such a target cannot be identified because information gathered in early stages causes the investigation to take unforseen paths.

37 St. John v. Fraser, [1935] 3 D.L.R. 465 (S.C.C.). In Williams and Williams v. Mid-Erie Acceptance Corp., supra note 31, Roach J.A. stated that the investigative power is administrative and "not a judicial proceeding in any sense". [1961] O.R. at 658.

38 S.O. 1971, c. 47, s. 3(2)(g). Furthermore, the conduct of an investigation under the securities laws has been held to be an administrative and not a quasi-judicial act. St. John v. Fraser, supra note 37.

the name of any witness examined or sought to be examined in an investigation, except upon the consent of the Commission. This section is discussed more fully below.[39] Generally speaking, the Commission will allow a person to obtain a transcript of his or her own evidence in an investigation but not that of other persons.[40]

Formal orders of investigation are not used with great frequency. At any given time, there are not likely to be outstanding more than three or four such orders, and there are probably 15 or 20 informal investigations conducted for each formal one. The chief difference between a formal and an informal investigation is that in the latter case there is no subpoena power and no witness testimony under oath. Persons will be asked to provide access to documents voluntarily and to provide signed, but not sworn, witness statements. From the investigator's point of view, the informal investigation may actually be preferable to the formal one because in the question-and-answer witness examination process of the formal investigation, the investigator may, in the course of eliciting information, unwittingly "tip his hand" to witnesses and, thereby, to prospective witnesses. That Commission investigators can obtain substantial cooperation in investigations without a subpoena is not surprising

39 Infra, text at notes 114-17, 153-58.

40 Thomson, supra note 35, at 102, OSC Policy 3-28.

in light of the Commission's cease trading power over issuers and various disciplinary powers over registrants. Often the need to "go formal" in an investigation arises only when information is being sought from entities such as banks and trust companies; for example, as to the beneficial interests behind nominee accounts that such entities hold. These entities are not subject to any direct Commission regulation and they may feel, quite properly, that they ought not to cooperate in an investigation absent an order to do so.

### C. Adjudication and Rule-Making

Finally, documentary information is generated from outside the Commission in the course of two of its functions that are classically the functions of administrative agencies: adjudications, and rule-making. Each one of these functions are discussed in detail below in connection with the Commission's disclosure practices; they are barely summarized here.

The term "adjudicative" or "adjudication" is used herein broadly to refer to a decision taken by the Commission or a senior staff employee thereof, after formal submissions, to grant or to deny to a

person or company a right or privilege under the Securities Act upon consideration of facts peculiar to that person or company.[41]

The OSC and its senior staff adjuciate in very many different contexts. These include: licensing of persons -- natural and corporate -- to engage in securities industry activity; issuance of prospectus receipts; disciplinary proceedings; grants of exemptions; and oversight of the Toronto Stock Exchange. Generally speaking, the Act requires that an opportunity for hearing be granted where it is proposed not to issue a licence or a prospectus receipt, in disciplinary matters and upon review of a TSE order at the instance of a person aggrieved, but not on applications for exemptions and not where the Commission is exercising a general oversight power over the activities of the TSE.[42] But even in these latter cases, the Commission will grant a hearing if a party asks for one

41 As employed herein, the term is not necessarily co-terminous with the "judicial" or "quasi-judicial" versus "administrative" distinction of Anglo-Canadian administrative law or with the meaning of "statutory power of decision" under the Statutory Powers Procedure Act.

42 The terms "opportunity to be heard" and "hearing" appear to be used interchangeably in the Securities Act. For example, s. 8(1) of the Act (Bill 7, s. 26(1)) states that the Commission shall not suspend or cancel a registrant's licence without giving him or her "an opportunity to be heard"; subsection (2) (Bill 7, s. 26(2)) then goes on to prescribe a procedure where the delay necessary "for a hearing under subsection 1" would be prejudicial to the public interest.

or even on its own motion.[43] In the absence of a requirement of a hearing in the Securities Act, whether one would be required by law under the rules of natural justice would turn on whether the particular Commission function would be classified by courts as "administrative" on the one hand or "judicial" or "quasi-judicial" on the other. The writer does not propose to enter that formidable and ultimately designless thicket,[44] apart from observing that in the case of applications for exemptions from the Act's provisions, courts would be likely to hold the Commission's function to be administrative since the decision must be highly discretionary,[45] and the grant of an exemption looks more like bestowal of a privilege than revocation of a right.[46] Since, however, the Securities Act provides a broad right of appeal to the Supreme Court from a "direction, decision, order or ruling of the

43 For example, the OSC has always reviewed the TSE's rate level and structure by way of public hearing. See M.Q. Connelly, "Fixed Versus Negotiated Commission Rates on the Toronto Stock Exchange" (1977), 2 Can. Bus. L. J. 244.

44 See generally Reid and David, Administrative Law and Practice (Toronto: 1978), at 117-80.

45 Id., at 158-60. But some caution in emphasizing the discretionary or policy nature of exemptions decisions is suggested by the Niagara Wire Weaving cases, in which the Court of Appeal instructed the Commission quite minutely as to precisely how the Commission's discretion in entertaining applications for exemptions from the financial reporting requirements of the Business Corporations Act was to be exercised. In Re Niagara Wire Weaving Co. Ltd., [1971] 3 O.R. 633 (No. 1); [1972] 3 O.R. 129 (No. 2).

46 Reid and David, supra note 44, at 43-44, 156-57.

Commission" at the instance of "any person or company primarily affected",[47] if such a person appeals from a denial of an exemption there will be a hearing at that stage. Furthermore, the availability of court review has sometimes been a factor cited by courts as indicating that a function of an agency is quasi-judicial in the first place.[48]

With respect to licensing securities market participants, the Act provides that the Director shall not refuse to grant or to renew a registration without giving the applicant an opportunity to be heard.[49] In fact the functions that the Act assigns to the Director are carried out by the Deputy Director-Registration. A person or company "primarily affected by" a direction, decision, order or ruling of the (Deputy) Director is entitled upon application to a "hearing and review" by the Commission.[50] The

47 Securities Act, s. 29; Bill 7, s. 9.

48 Re General Accident Assurance Co. of Canada (1926), 58 O.L.R. 470, 478, [1926] 2 D.L.R. 390, 397 (C.A.); Pioneer Laundry & Dry Cleaners v. M.N.R., [1940] A.C. 127, 136, [1939] 4 D.L.R. 481, 485; Re Robertson & Scott (1973), 35 D.L.R. (3d) 451, 458 (B.C.S.C.); see generally, Reid and David, supra note 44, at 163-64.

49 Securities Act, s. 7(2); Bill 7, s. 25(3).

50 Securities Act, s. 28; Bill 7, s. 8(2). Under Bill 7, s. 8(1) the Commission may also review the decision sua sponte. It has been held that where the hearing before the Director fails to comply with the requisites of natural justice, this failure will be cured by a procedurally adequate hearing before the Commission itself. Re Clark and Ontario Securities Commission, (cont'd)

expression "hearing and review" has been interpreted to mean hearing de novo, so that the applicant and the staff counsel are each free to introduce new evidence before the Commission that was not before the (Deputy) Director.[51] The procedural context in the case of a negative decision by the Deputy Director-Filings on whether to issue a receipt for a prospectus would be exactly parallel to the licensing case.[52]

Disciplinary proceedings are of three types: orders suspending trading in the securities of an issuer, which most frequently are imposed where the issuer has failed to comply with its continuous disclosure obligations or there is some unexplained market activity

50 (cont'd) [1966] 2 O.R. 277 (C.A.); see Re Chromex Nickel Mines (1970), 16 D.L.R. (3d) 273, 283, [1971] 1 W.W.R. 163 (B.C.C.A.), affirmed sub nom. Hretchka v. AGBC, [1972] S.C.R. 119, [1972] 1 W.W.R. 561, 19 D.L.R. (3d) 1; see also Posluns v. Toronto Stock Exchange, [1966] 1 O.R. 285 (C.A.).

51 D.L. Johnston, Canadian Securities Regulation (Toronto: 1977), at 51-54.

52 Securities Act ss. 61, 28; Bill 7, ss. 60, 8(2). Under s. 8(1) of the Bill, the Commission might review the Deputy Director's decision sua sponte. In a case wherein it was sought to enjoin the Director from issuing a receipt for a prospectus, it was held that such function was an administrative and not a judicial one and that it was therefore not reviewable by way of a writ of prohibition or injunction. Voyager Explorations Ltd. v. Ontario Securities Commission, [1970] 1 O.R. 237 (H.C.J.) (Ontario-incorporated company seeks to enjoin OSC Director from issuing receipt for prospectus filed by Alberta-incorporated company with similar name to plaintiff's). Where the Director refuses to issue a prospectus receipt, the administrative versus judicial question does not arise because the statute itself provides for judicial review.

indicating the possiblity of insider trading;[53] suspensions and cancellations of registrants' licences;[54] and orders denying to a person or company the availability of the statutory exemptions from the registration and prospectus requirements.[55] Before the Commission can invoke these disciplinary powers it must extend to the respondents an opportunity for hearing "unless in the opinion of the Commission the length of time required for a hearing would be prejudicial to the public interest", in which case the Commission can issue a temporary order and a hearing must be held promptly thereafter. In practice, what the Legislature appears to have envisaged as the exceptional procedure had, until recently at least, become the norm: the Commission would almost always suspend first and ask questions later. This practice would appear to have had the psychological -- if not legal -- effect of putting the shoe onto the respondent's foot. The Commission asserts that in the last year or so it has sharply cut back on the practice of suspending

53 Securities Act, s. 144; Bill 7, s. 123. A cease trading order may also issue upon request of the issuer pending announcement of some important corporate development, such as a take-over bid.

54 Securities Act, s. 8; Bill 7, s. 26.

55 Securities Act, s. 19(5); Bill 7, s. 124. This is an extremely broad power that could be used to deny to a person the ability to trade securities altogether. Any investor proposing to make even a casual trade in securities in the secondary market needs either a licence to do so or the exemption in s. 19(1)2 of the Act (Bill 7, s. 34(1)2) for an isolated trade or the exemption in s. 19(1)7 (Bill 7, s. 34(1)10) for a trade by a person or company acting solely through a registered agent.

temporarily before hearing and has tended to limit the practice to suspensions of firms for violations of the minimum capital rules. In such cases, there would be a pressing danger to customers in allowing the firm to do business pending a hearing, and the facts are usually not susceptible to more than one interpretation.

There is another type of disciplinary adjudication that would be made in the first instance by the Deputy Director-Registration. Where a securities salesman applies for permission to transfer his registration to another employer[56] or for a renewal of registration,[57] an informal hearing will be held before the Deputy Director where the Commission's investigatory staff has developed information that would tend to cast doubt upon the salesman's continuing suitability for registration. From an adverse decision of the Deputy Director, an appeal lies to the Commission.

Disciplinary orders of the Commission and opinions, where there are any, are published by the Commission.

56 A salesman's registration lapses automatically upon termination of employment with a particular employer and is not reinstated until another firm indicates that it wishes to employ the salesman. Securities Act, s. 6(4); Bill 7, s. 24(2).

57 Registration must be renewed on an annual basis. R.R.O. 1970, Reg. 794 as amended, s. 4. This fact and the tying of the licence to a particular employer give the Deputy Director an enormous leverage over salesmen without need to resort to formal proceedings under s. 8 of the Act.

As the Act is a comprehensive code of securities regulation written with a certain degree of generality, so there are numerous provisions from whose operation in a given case a person or company may apply to be exempted. Applications may be made to be declared an exempt purchaser, that is, a purchaser to whom securities can be sold without compliance with the registration and prospectus requirements;[58] by an issuer to be freed from compliance with the prospectus and registration requirements;[59] by an issuer to be exempted from all or certain of the periodic financial disclosure requirements[60] or proxy solicitation requirements;[61] by any person for an exemption from the

58 Securities Act, s. 19(1)3; Bill 7, ss. 34(1)4, 71(1)(c).

59 Under the present Securities Act there are two relevant provisions: s. 20, under which the Commission may rule that the registration and prospectus provisions do not apply to any trade, security, person or company, as the case may be; and s. 59, under which the Commission may rule that a trade or an intended trade in a security shall be deemed not to be a distribution to the public. If a distribution is not to the public, then there is no obligation to file a prospectus under s. 35 of the Act. The Commission, in granting a s. 59 order, will also grant a registration exemption, if appropriate. By the terms of s. 59(3) there is no appeal from a Commission determination under s. 59. The Commission rarely grants applications under s. 20; applicants are almost always, therefore, forced to proceed under s. 59. Under Bill 7 there is only one provision, s. 73, under which an application for exemption from the prospectus and registration requirements can be brought. It carries forward the non-reviewability provision of the old s. 59.

60 Securities Act, s. 132; Bill 7, s. 79.

61 Securities Act, s. 104; Bill 7, s. 87.

requirement to file insider trading reports;[62] and by an acquiror to have a take-over bid declared to be an exempt offer so that the take-over bid provisions, and chiefly the requirement that a take-over bid circular be filed, would not apply.[63] Applications for exemptions in connection with take-over bids, in particular, will become vastly more important under Bill 7 because the new law also reaches issuer bids for their own shares and in effect outlaws control premiums in non-exempt take-over bids.[64]

Exemptions may be sought upon application to the Commission. The Commission may generally delegate any of its powers to the Director,[65] and it has delegated to him the power to entertain in the first instance applications for exemptions from the insider trading, proxy and periodic financial disclosure reporting requirements.[66] But even where exemption applications are adjudicated by the Commission in the first instance rather than by the Director or his Deputy with an appeal to the Commission, the position taken by the Director or Deputy, as the staff view put

62 Securities Act, s. 116; Bill 7, s. 117.

63 Securities Act, s. 90; Bill 7, s. 99.

64 Bill 7, ss. 88(1)(d), 91.

65 Securities Act, s. 4; Bill 7, s. 6. The Commission may not delegate its powers to initiate and supervise investigations, id., nor, it would seem, its ultimate review power.

66 Canadian Securities Regulation, supra note 51, at 49 n. 42.

before the Commission, may be an important or even determinative factor in the decision upon the application. As indicated above,[67] the Act does not require a hearing or an opportunity to be heard on an exemption application. The order made upon an application is public; the Commission publishes all orders in its Weekly Summary. An order exempting an issuer or relating to a particular issuer will also be part of the issuer's public file maintained at the Commission. Oddly, however, the applications themselves, submissions in support and staff submissions are not made public.

Finally, the OSC's oversight over the TSE is of two types. The first type, which clearly involves adjudication, occurs where a person aggrieved by a decision of the Exchange applies to the Commission for a hearing and review thereof.[68] In such a case, the Commission is in a role very similar to a reviewing court. Applications (which have been few) for a Commission review of Exchange decisions have involved such matters as denial of membership or of registered representative status or of permission for a change in control of a member.[69] The OSC also has

67 Supra text accompanying note 42.

68 Securities Act, s. 140(3); Bill 7, s. 22(3).

69 E.g., In the Matter of Lafferty, Harwood & Partners Ltd., [1974] OSC Bulletin 125, affirmed, (1975), 8 O.R. (2d) 604 (Div. Ct.); In the Matter of Edward Williams, [1972] OSC Bulletin 87; In the Matter of Margaret Frappier, [1978] OSC Bulletin 297; In the Matter of Baker, Weeks Canada Ltd., [1977] OSC Bulletin 32. (cont'd)

another much broader oversight power with respect to the TSE in that it "may, where it appears to it to be in the public interest, make any direction, order, determination or ruling" with respect to certain enumerated matters which in essence comprehend any aspect of the Exchange's business.[70] Exercise of this broad oversight jurisdiction is perhaps more akin to rule-making than to adjudication since it would seem most likely to take place in the context of review of TSE by-laws and rules and would be determinative of rights and duties in futuro only, rather than attaching penalties or other legal consequences to acts that have already occurred.[71]

69 (cont'd) In the Matter of Hill and the Vancouver Stock Exchange, (1975), CCH Can. Sec. L. Rep. para. 70-077, the Corporate and Financial Services Commission of British Columbia decided that a person who had unsuccessfully asked the VSE to initiate an investigation into allegations that a member firm had misused the person's securities was not "a person aggrieved" under the parallel provision of the BC Securities Act.

70 Securities Act, s. 140(2); Bill 7, s. 22(2).

71 Under this test, the grant of an exemption might also be said to be rule-making rather than adjudication, except that exemptions are totally dependent on the facts of a specific application and do not operate with any generality. The rule-making versus adjudication distinction is one well known to administrative law; it is very important in American administrative law because of the differing requirements of the Administrative Procedure Act depending on which function is involved. It is important in Ontario because the Statutory Powers Procedure Act, S.O. 1971, c. 47, which applies to decisions deciding the legal rights, powers, privileges or immunities of any person or the eligibility of any person for a benefit or licence, s. 1(d), does not apply to "proceedings of a tribunal empowered to make regulations, rules or by-laws insofar as its power to make regulations, rules or by-laws is concerned". SPPA, s. 3(h). The OSC is not such a tribunal. See text immediately infra.

While the Commission has no general rule-making power and the broad rule-making power under the Act is reserved to the Lieutenant Governor in Council,[72] in fact the Cabinet's role appears to be a formality and the regulations as adopted are those proposed by the Commission. In addition to formal regulations, there are also numerous "policy statements" on various topics published from time to time by the OSC.[73] While the policy statements in legal theory lack the force of regulations,[74] they are often treated both by the OSC and by the industry more as law than as guidelines.[75] In the preparation both of regulations and of

72 Securities Act, s. 147; Bill 7, s. 139.

73 In addition there are a series of policy statements published by all of the Canadian securities administrators, known as "National Policy Statements", and by the administrators of the "Uniform Act" provinces, viz., Ontario and provinces to the west of it, known as "Uniform Act Policy Statements".

74 Re Hopedale Developments Ltd. v. Oakville, [1965] 1 O.R. 259 (C.A.); Re Armstrong and Canadian Nickel Co. Ltd., [1970] 1 O.R. 708 (C.A.). See H. Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Discretion" (1972), 18 McGill L.J. 310, 313-314; B. Lockwood, "Procedures in Cross Country Prospectus Clearance and Regulation by Policy Statement", [1972] L.S.U.C. Special Lectures 111, 123-124; J. Baillie, "Protection of the Investor in Ontario" (1965), 8 Can. Pub. Admin. 172, 214; J. Baillie, "Securities Regulation in the Seventies", in Studies in Canadian Company Law, supra note 23, at 354; J. Cowan, "The Discretion of the Director of the Ontario Securities Commission" (1975), 13 Osgoode Hall L.J. 735, 773.

75 This is particularly true of those national policies relating to the regulation of the mutual fund industry, to the Uniform Act policy No. 2-12 on timely disclosure, and to Ontario policies Nos. 3-02 and 3-03 on mining financing and No. 3-22 on applications for prospectus exemptions by non-reporting

(cont'd)

policy statements the Commission invites submissions from interested parties through notices published in the Weekly Summary and occasionally in the monthly Bulletin. And industry sources do in fact make voluminous submissions. At the time of writing, the OSC is engaged in a veritable flood of rule preparation for Cabinet relating to the operation of the new Securities Act. Scarcely a week passes in which the Summary does not announce a new topic for rule-making consideration.

D. Internal Documents

Finally, in cataloguing the documentary information likely to be in the Securities Commission's possession, there falls to be considered not just information originating from outside, but the Commission's own internally-produced working papers. None of these internally-generated documents would at present be available to the public or to any segment thereof. Such material would include staff memoranda to the Commission suggesting that a formal investigation or a disciplinary proceeding be instituted or that the Commission should consider generally, perhaps in a rule-making context, a certain

75 (cont'd) issuers. For an extraordinary example of the use of a policy statement as a substantive rule, see In the Matter of Harold P. Connor (National Sea Products Ltd.) [1976] OSC Bulletin 149, commented upon in 2 Can. Bus. L. Jour. 454 (1978).

problem area in the field of securities regulation. On the same subjects as memoranda from staff to the Commission, there will be memoranda between junior and senior staff. For every investigation in process there are staff memoranda summarizing the results thereof; some of these memoranda have a statutorily recognized status since the Act provides that a report of every formal investigation be made to the Commission.[76] Memoranda prepared by staff lawyers or under their supervision relating to adjudicatory proceedings would appear to be analogous to private counsel's work-product prepared in anticipation of litigation. Another broad category of internal memoranda are those memorializing contacts between commissioners or staff and members of the industry or their lawyers.

So far as the writer has been able to discover, there are no formal and generally applicable written instructions from the Commission to the staff, apart from the published policy statements, and so there is no "secret law" problem in the OSC in that sense. There is an investigations manual, but apparently it is very basic and not in fact much consulted by OSC investigators.

76 Securities Act, s. 21(9); Bill 7, s. 11(9).

CHAPTER II

# THE DISCLOSURE PRACTICES OF THE ONTARIO SECURITIES COMMISSION

## A. Publications

The OSC publishes a great deal of information relevant to its operations. It issues two publications on a regular basis and available at a modest subscription price: the Weekly Summary and the monthly Bulletin.

The following are the major categories of material appearing in the Weekly Summary:

- summaries of orders issued by the Commission. Most of these are cease trading orders and orders granting exemptions, most commonly exemptions under section 59 from the prospectus and registration requirements;
- a list of preliminary prospectuses received by the Commission and prospectuses for which a final receipt has been issued;
- continuous disclosure reports are listed as received, by issuer;
- information reported on Forms 11 and 12 relating to the private placement of securities (i.e., placements for which no prospectus is required), is summarized; 77

77 The Forms 11 are filed by issuers of securities when they place securities "privately"; that is, to institutional purchasers in transactions for which there is a prospectus (cont'd)

- notices of topics for proposed rule-making and invitations for written comments; and
- certain statistical summaries relating to the securities markets.

The monthly Bulletin of the OSC includes the full texts of policy statements as they are issued and reports opinions of the Commission in adjudicatory proceedings. It lists new, lapsed and suspended registrations, and on an annual basis a list by category of all registrants (other than salesmen) is published in the Bulletin. Most of the Bulletin's space is taken up, however, by summaries of insider trading reports.

77 (cont'd) exemption under s. 58 of the Securities Act. As a condition to the prospectus exemption it is generally required that the purchaser take "for investment only"; the requirement of investment intent, however, is not construed as permanently barring the private placee from ever reselling, and reports of such resales are made on the Forms 12. See generally, In the Matter of Warren Explorations Ltd., [1976] OSC Bulletin 111. Under Bill 7, ss. 71(4)-71(7), the indeterminateness of the investment intent requirement will be replaced by mandatory holding periods of from 6 to 18 months before the securities of "reporting issuers" (those obligated to file continuous disclosure documents) taken in private placements can be resold. Resales of securities of non-reporting issuers issued without a prospectus will not be permitted.

In late 1978, in a sort of reverse freedom of information initiative, the OSC decided to cut back on the amount of information from the Forms 11 and 12 to be published in the Weekly Summary. In particular, for most transactions the name of the purchaser will no longer be published in the Form 11 summaries, and in those situations where the purchaser's name is omitted from the Forms 11, Forms 12 will not be publicized at all. The announcement of the change in practice was not closely reasoned, but it adverted generally to the desirability of privacy. See Ontario Policy 3-39, in Weekly Summary, December 8, 1978, Supp. "C".

Apart from the Commission's publications, there is a commercially produced reporting service[78] that reports the provincial securities acts, regulations and policy statements as well as Securities Commission and judicial opinions and other major developments in the field on a regular basis. Another commercial publisher[79] puts out an annual paperbound volume containing the Ontario Securities Act, regulations, forms and policy statements.

Altogether, in terms of volume at least, there is a wealth of information published on a regular basis by and about the OSC.

## B. The Commission's Public Files

The Commission maintains two types of files to which the public has access upon payment of a nominal fee. The first type is issuer files. The public file on a particular issuer will contain its statutory filings such as preliminary prospectuses and prospectuses (but not deficiency letters or other correspondence relating to prospectuses filed by that issuer), Forms 11 and 12,[80] periodic financial reports and timely disclosure filings. It will also contain any

78 CCH. Canada Ltd., Canadian Securities Law Reporter.

79 Richard de Boo Ltd.

80 But subject to Ontario Policy 3-39, *supra* note 77.

orders relating to the issuer, such as cease trading orders or orders granting exemptions (but not applications and supporting documentation concerning the request for exemption). In general the issuer's public file at the Commission contains the sort of information that the issuer itself would freely make available to the public. The other kind of public files are insider trading reports. These are collated again by issuer. Public access to these reports has some theoretical importance because where an insider has made use of material undisclosed information concerning the issuer, such person may be liable to pay damages to the issuer and to the person with whom he has traded.[81] If one had reason to suspect that insider trading had occurred in such circumstances, access to the reports filed with the Commission might prove valuable.

The new Ontario Securities Act, Bill 7, contains a disclosure provision that, depending on its interpretation by the Commission, could open up more material filed with the OSC to public scrutiny. Section 137(1) of the Bill provides that

81 Securities Act, s. 113; Bill 7, s. 131. Since the creation of civil liability remedies for insider trading in 1966, there has been only one reported case of a tradee seeking recovery of damages, Green v. Charterhouse Group Canada Ltd. (1976), 12 O.R. (2d) 280, 68 D.L.R. (3d) 592 (C.A.), and one where the corporation sought to recover, Multiple Access Ltd. v. McCutcheon (1977), 78 D.L.R. (3d) 701 (Div. Ct.). In Green, plaintiff failed on the merits, and in Multiple Access the plaintiff has thus far been blocked by a constitutional obstacle, although the case is presently on appeal to the Supreme Court of Canada.

> [w]here this Act or the regulations require that material be filed, the filing shall be effected by depositing the material ... with the Commission and all material so filed shall, subject to subsection 2, be made available by the Commission for public inspection ....

Subsection (2) then gives to the Commission a very broad discretion to override the generality of subsection (1); it provides that

> the Commission may hold material or any class of material required to be filed by this Act in confidence so long as the Commission is of the opinion that the material so held discloses intimate financial, personal or other information and that the desirability of avoiding disclosure thereof in the interests of any person or company affected outweighs the desirability of adhering to the principle that material filed ... be available to the public for inspection. 82

The Commission's power not to disclose is put in the broadest conceivable terms. The Commission need satisfy itself only that the information is "intimate" and that the interest of a person or company in non-disclosure is weightier than the desirability of adhering to the principle of public access. Assuming that in a case where the Commission exempted material from public disclosure, a

82 The disclosure provision of Bill 7's predecessor bills was much broader and left the Commission with no discretion not to disclose. It was provided simply that "[t]he Commission shall make all material filed under this Act or the regulations available for public inspection ... , and the verb "file" was defined to mean "to deliver to the Commission". Bill 98, 5th Sess., 29th Legis., ss. 1(1)15, 134; Bill 20, 4th Sess., 30th Legis., ss. 1(1)15, 139; Bill 30, 1st Sess., 31st Legis., ss. 1(1)15, 139. The wording that finally was enacted as subsection (2) was introduced into Bill 7 after second reading when it was in the Administration of Justice Committee. It was taken directly from s. 9(1)(b) of the Statutory Powers Procedure Act, S.O. 1971, c. 47, which enunciates an exception to the principle that hearings under the Act be public.

person who wanted access to the material would be construed to be "directly affected" so as to have standing to appeal to the Supreme Court,[83] it would appear unlikely that the Court would reverse the Commission. Since the statutory language specifies that it is the Commission that is to be satisfied of the desirability of avoiding disclosure, the Court would be likely to construe its appellate jurisdiction quite narrowly.[84]

In December, 1978 the Commission issued for discussion purposes a draft memorandum to its Director regarding public availability, under

83 This is the requirement for standing in s. 9 of Bill 7; the phrase "primarily affected" is used in the corresponding provision of the Securities Act, s. 29.

84 This prediction is made notwithstanding that the Securities Act, s. 29, and the corresponding provision of Bill 7 bestow quite a broad appellate jurisdiction on the court, including the power to direct the Commission "to make such ... order or ruling ... as the Commission is authorized and empowered to do under this Act ... and as the court considers proper". The court's function on appeal is generally considered to be broader than in other types of judicial review of agency action. See Reid and David, supra note 44, at 302-05, 453-60. Generally on appeal from Securities Commission decisions, courts have been loathe to declare themselves empowered to substitute their assessment of the facts for that of the Commission. E.g., Re Securities Act and Morton, [1946] O.R. 492, 496 (C.A.); Re Mitchell and OSC (1958), 12 D.L.R. (2d) 221, 225 (C.A., single judge); Re Maher Shoes Ltd. and OSC, [1971] 2 O.R. 267, 17 D.L.R. (3d) 519 (C.A.); Re Western Ontario Credit Corp. and OSC (1975), 9 O.R. (2d) 93; 59 D.L.R. (3d) 501, 510-11 (Div. Ct.). But see, Niagara Wire Weaving Co. Ltd., supra note 45; cf., Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] A.C. 1014 (C.A. and H.L.).

section 137, of filed material.[85] In general the memorandum does not seem to envisage much broader public disclosure of documents filed by third parties than is now made. Of course a great deal of filed material is already made public by the Commission. The memorandum notes that "the word 'filed' is one of precise meaning in the Act [Bill 7]". In fact the term is not defined at all in Bill 7. In two respects the memorandum does envisage more disclosure than at present: applications for registration and registrants' financial statements would be made public "so far as this can be done without detracting from the reasonable expectations of registrants that their private affairs will not be publicized", and much supporting material in the prospectus process not currently part of issuers' public files would be made public.

## C. Disclosure to Parties in Adjudications

### 1. Agency Proceedings

Parties who find themselves in litigation before the Commission have, of course, a particular interest in disclosure. They would usually want discovery of the case that the Commission staff has against

85 OSC Weekly Summary, December 8, 1978, Supplement "X".

them in order to prepare a defence. There are no rules for discovery in the Statutory Powers Procedure Act or in the Ontario Securities Act or the regulations thereunder. Generally speaking, after a notice for hearing has issued, Commission staff counsel will comply with a request from counsel for the respondent for disclosure of documentary evidence that the staff plans to present in the hearing, as well as for the names of witnesses that the staff plans to call at the hearing and the statements of those witnesses made to Commission investigators. But there will be no full disclosure made of an investigatory file. That is, only such documentary evidence or witness identities as the staff plans to use will be disclosed, notwithstanding that in theory it is quite possible that a respondent's counsel might wish to pursue leads suggested by the staff's investigatory file but that the staff has not seen fit to pursue. Upon occasion, staff counsel will decline to disclose names of witnesses in advance of the hearing. There is likely to be reluctance to disclose witness names, for example, in a disciplinary proceeding against a registrant where the witnesses are complaining customers of the registrant and Commission counsel fears that the registrant might attempt to influence the customers to modify their stories. Whatever discovery is made by Commission counsel in an adjudicatory proceeding is purely a matter of grace; it is compelled neither by statute, regulation nor obligation arising from concepts of natural justice. This point will be explored at somewhat more length in the remainder of this section.

Although in its conduct of hearings the OSC would in most cases be bound by the requirements of the Statutory Powers Procedure Act, the rules for the conduct of hearings established in the Securities Act are in general more than sufficient to satisfy the SPPA standards. Two requirements from the SPPA that are not repeated in the Securities Act, however, are that where a party's good character, propriety of conduct or competence are in issue, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto,[86] and that hearings are to be open to the public except where the tribunal is of the opinion that "intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature" that the desirability of avoiding disclosure outweighs the general policy in favour of open hearings.[87] Obviously the propriety of a party's conduct is always at issue in Securities Commission hearings, and the notices of hearing issued to parties are usually sufficiently detailed so that, even in the absence of any discovery from staff counsel, a party would have a very good idea of what would be sources of relevant information. Commission hearings (to be distinguished, of course, from meetings of the Commission or meetings among commissioners) are

86 SPPA, s. 8. This provision was construed briefly in Re Kellar and College of Physicians and Surgeons (1977), 17 O.R. (2d) 516 (Div. Ct.).

87 SPPA, s. 9.

generally open to the public,[88] although it is exceedingly rare for anyone other than parties, witnesses and their respective counsel to attend. Notices of rule-making type hearings are published in the Weekly Summary, but on the disciplinary side there is no such general notice published. Where a disciplinary hearing is thought to be of particular interest to the public, a Commission staff member may take it upon himself to notify the financial press of the upcoming hearing. One can imagine that that practice might be disconcerting to a particular party subject to a hearing of which such notification had been made.

Section 5 of the Securities Act[89] provides: that notice of hearing is to be sent to any person or company "primarily affected" by it; that the hearing officer has the same power to summons and enforce the attendance of witnesses as is vested in the Supreme Court for the trial of civil actions; that the legal or technical rules of evidence are not binding; that the transcript of oral evidence plus documentary evidence entered are to comprise the record; and that a witness may be represented by counsel. It is further provided that written reasons will issue upon the request of any person or company

88 Sometimes, however, some evidence may be received in camera. See, e.g. In the Matter of Harold P. Connor, supra note 75.

89 There is no corresponding provision in Bill 7. Presumably the subjects presently dealt with in section 5 will be in the regulations under the new Act.

whose right to trade in securities has been adversely affected and that notice of every order and the written reasons therefor, if any, shall be sent to every person who was notified of the hearing.

There are no statutory procedures for discovery from the OSC, and the courts are not likely to invent them. Indeed, there is in Canada no mandatory discovery in criminal cases, although for some indictable offences the preliminary hearing may in practice provide a rough equivalent to discovery.[90] If discovery is not part of natural justice for criminal cases, it is hard to see why it should be so for proceedings before administrative tribunals. The argument in favour of discovery would be that where a party concededly enjoys a right to a hearing, he cannot present his case effectively at the hearing in the absence of discovery. But there is no indication in reported cases that Canadian courts advance that argument to the status of a requirement of natural justice or even, indeed, of fairness -- if fairness is the "new" natural justice.[91]

90 See generally, Law Reform Commission of Canada, Working Paper No. 4, Criminal Procedure, Discovery (1974); Law Reform Commission of Canada, Report, Discovery in Criminal Cases (1974); G.A. Martin, "Preparation for Trial", [1969] L.S.U.C. Special Lectures 221.

91 See, D.J. Mullan, "Fairness: The New Natural Justice?", 25 U.T.L.J. 281. There is recent indication -- not in the context of discovery in administrative proceedings -- that Professor Mullan's suggestive title was prophetic. See, Nicholson v. Haldimand-Norfolk Regional Board of Police Commissioners (1978), 88 D.L.R. (3d) 671, 23 N.R. 410 (S.C.C.).

There are indeed numerous cases in which courts have compelled administrative tribunals to reveal information to parties in proceedings wherein the parties had a right to hearing before the tribunal, but these cases have all involved disclosure of information upon the basis of which the tribunal proposed to act. They involve, in effect, the right to notice of relevant facts at the hearing and not a right to discovery in advance of it.

The leading case in this line is Minister of National Revenue v. Wright's Canadian Ropes Ltd.[92] There the Minister had disallowed certain expenses claimed by the taxpayer in determining its liability under the Income War Tax Act. The material before the Minister when he made his determination included the financial statements furnished by the taxpayer and a certain report made to the Minister by the Inspector of Income Tax. The Minister had declined to produce the report to the taxpayer. On appeal, the Privy Council professed to hold not that the report had to be produced but that, since the right of appeal from the Minister's decision to the Exchequer Court must have been intended to be meaningful, the Minister's decision disallowing the claimed expenses would be reversed where the only factual basis for it must have been contained in the confidential report since none appeared in the taxpayer's financial statements. Lord Greene stated that if the Minister in fact had had information

92 [1947] 1 D.L.R. 722 (P.C.).

to support his determination, "it would have been impossible to suppose that he would not have informed the [taxpayer] of at least the substance of it ...." His Lordship explained:

> The contrary supposition would involve that the [Minister] had come to a decision adverse to the [taxpayer] upon material of which, so far as he knew, the [taxpayer] was completely ignorant and knowledge of which he deliberately withheld from them. 93

In other words, wherever a statute provides a right of appeal, there must be sufficient factual material in the record to support the judgment appealed from.

In Re Fairfield Modern Dairy and Milk Control Board[94] the court issued an order of prohibition against the Board where it had suspended the Dairy's vendor's licence upon the alleged basis that the Dairy had sold milk without collecting payment therefor. The Board had refused to reveal to the Dairy the names of the persons to whom the milk had allegedly been sold. In R. v. Labour Relations Board, ex parte Loomis Armoured Car Service,[95] the British Columbia Supreme Court held that the Board had violated the rules of natural justice where, in a certification proceeding, it refused to reveal to the employer the written submission of the union in response to

93 [1947] 1 D.L.R. at 733.

94 [1942] 2 O.W.N. 579 (H.C.J.).

95 (1963), 42 D.L.R. (2d) 49 (B.C.S.C.). See also, Re Cypress Disposal Ltd. and Service Employees International Union, Local 244 (1974), 50 D.L.R. (3d) 150 (B.C.C.A.).

the employer's written submission. The same court has held in another labour relations case[96] that the Industrial Relations Board violated the rules of natural justice where, acting under the Payment of Wages Act,[97] it ordered an employer to pay security for wages without disclosing to the employer the complaint filed under the Act or the identity of the complainant. Notwithstanding that the Act provided that information obtained under it by a member or employee of the Board "shall not be open to inspection by any person or any court"[98] and that no member or employee of the Board "shall be required by any Court to give evidence relative to the information obtained for the purposes of this Act",[99] the Court held that the Board had to provide the employer with "at the very least an outline of the nature of the complaint and an account of the evidence the Board has before it".[100] To do otherwise would have made the employer's right to a hearing, explicitly granted by the Act, chimerical.[101]

96 Re Board of Industrial Relations and Granada Construction Co. Ltd. (1973), 39 D.L.R. (3d) 153 (B.C.S.C.).

97 1962 (B.C.), c. 45.

98 1962 (B.C.), c. 45, s. 20(1).

99 1962 (B.C.), c. 45, s. 20(2).

100 39 D.L.R. (3d) at 158.

101 In two cases arising under the Ontario Workmen's Compensation Act, R.S.O. 1970, c. 505, courts have approached to the brink -- and then drawn back on procedural grounds -- of holding that the Board must disclose to the claimant the entire contents of the file upon which the Board proposes to act. WCB v. Rammell (1962), 31 D.L.R. (2d) 94 (S.C.C.); R. v. WCB, ex parte Kuzyk, [1968] 2 O.R. 337 (C.A.).

The extent to which courts will go to avoid finding that the statute permits an administrative tribunal to act on the basis of facts not revealed to the parties is illustrated in the judgment of Jackett, C.J. for the Federal Court of Appeal in Re Magnasonic Canada Ltd. and Anti-Dumping Tribunal.[102] Under the Anti-Dumping Act, a determination of dumping may be made by the Tribunal only after a hearing at which all parties may be heard. Section 29(3) of the Act provides that confidential, financial information gathered in the course of an inquiry "shall not be made public in such manner as to be available for the use of any business competitor or rival".[103] The Tribunal made a finding of dumping of Japanese television sets against Magnasonic, an importer. In the course of reaching its judgment, the Tribunal used confidential financial evidence that it had taken from a Canadian manufacturer in camera with no one present except the party giving evidence. The Court of Appeal held that in relying upon evidence not revealed to most of the parties, the Tribunal had failed to comply with the statutory requirement of a hearing.[104] The Tribunal was obligated to provide some method or

102 (1972), 30 D.L.R. (3d) 118.

103 R.S.C. 1970, c. A-15, s. 29(3).

104 But see, Seafarers International Union of Canada v. Canadian National Railway Co., [1976] 2 F.C. 369 (C.A.), holding that in a proceeding under s. 27 of the National Transportation Act in which the Canadian Transport Commission was to determine whether to disallow a carrier from acquiring another carrier, the Commission was not obligated to reveal to an objector all of the information upon the basis of which the Commission had (cont'd)

other whereby all of the evidence would be revealed to the parties. Otherwise they were not being heard.[105]

The only case that even comes close to holding in favour of a right to discovery in administrative proceedings (as opposed to a right to exclude extra-record facts) is another decision of Jackett, C.J. in Re CRTC and London Cable T.V. Ltd.[106] There it was held that the Canadian Radio-Television Commission had failed to hold the public hearing required under the Broadcasting Act when, in a proceeding involving a cable television company's application for a subscription rate increase, it refused to grant to the subscriber-intervenor access to the data filed by the applicant comparing its financial position under the current rates and under the higher rates applied for. The court held that without the information the intervenors "had no means of forming a considered opinion as to

104 (cont'd) decided against disallowance. The Court's decision was based explicitly upon the fact that under s. 27, conduct at a hearing was only one of the ways in which the Commission might inform itself of the facts.

105 The Court of Appeal's judgment may violate the familiar canon of statutory construction that the specific governs over the general. That parties have a right to be heard is nowhere stated explicitly in the Anti-Dumping Act, although it certainly is a proposition that one would draw from reading various provisions of the Act together. On the other hand, the prohibition against publicizing evidence in such a way that it can be used by the provider's competitors is explicit in s. 29(3).

106 [1976] 2 F.C. 621 (C.A.).

whether such increase was justified by the circumstances and ... if they concluded that it was not, of preparing themselves to put forward their position at the hearing".[107] If, as Chief Justice Jackett says, the financial statements must be made available to the intervenors to enable them to prepare for the hearing, then obviously it would not be sufficient simply to place them in the public record at the hearing. Either the hearing would have to be adjourned to give the intervenors sufficient time to study and react to the data or else the data would have to be provided to the intervenors in advance of the hearing, that is, in some form of discovery.

None of the access-to-information cases described above seems at bottom to hold anything more than that parties to a proceeding are entitled to notice of the factual basis upon which the tribunal proposes to act in order to be able to rebut those facts. Such notion is, however, well accepted by the OSC. The Commission regards itself as bound by the record compiled at the hearing in coming to decisions and parties are accorded the fullest rights of cross-examination. In adjudicatory proceedings the Commission rarely takes evidence *in camera* and never outside the presence of the parties or their counsel. The desirability of discovery in proceedings before the OSC would therefore have to be rested solely on its contribution to adequate preparation by counsel.

107 *Id.*, at 625.

It is clearly contemplated by the present Securities Act that different functions — investigatory, prosecutorial and adjudicatory — will be combined in the one agency and even in the same persons within the agency.[108] Where the Commission has ordered a formal investigation, a report thereof must be made to the Commission,[109] and the results of even an informal investigation will in fact be made known to the Commission when further action is contemplated. The decision to initiate disciplinary proceedings is also that of the Commission, and upon occasion one or another of the commissioners may take an active role in drafting the notice of proceedings.[110] The commissioners obviously will also adjudicate the disciplinary proceedings, and there is no requirement that commissioners involved at earlier stages not be among the adjudicating commissioners. Not all of the facts alleged in the report of investigation will be proven by staff counsel at the hearing, yet in many cases the adjudicators may have in their minds a penumbra of prejudicial but unproven facts. Under these circumstances, it is important that the respondent have discovery of the report of investigation so that he can know what the commissioners have been told. The availability of judicial review is not in these circumstances an adequate substitute

108 Re W.D. Latimer Co. Ltd. and Bray (1974), 52 D.L.R. (3d) 161 (Ont. C.A.).

109 Securities Act, s. 21(9); Bill 7, s. 11(9).

110 As in, e.g., Re W.D. Latimer Co. Ltd. and Bray, supra note 108.

for discovery. The realistic question is not, "Is there evidence in the record to support the findings of the Commission?" There always will be. The question is, rather, "Would the commissioners have made the same finding, both on violation and on the appropriate sanction, if they had come to the particular hearing 'cold'?"

Bill 7 has gone a long way toward resolving this particular problem. Section 3 provides that a commissioner who receives a report of investigation ordered under section 11 (formal investigations) and who issues thereupon an order for the initiation of disciplinary proceedings may not sit in adjudication of the hearing absent the written consent of the respondent.[111]

This provision, however, insulates adjudicating commissioners from prejudicial pre-knowledge only in those cases, likely a minority of the total,[112] where the proceeding is initiated following a formal investigation. It does not call for a general separation of the adjudicatory from the investigative and prosecutorial functions.

111 The present *Act*, like Bill 7, provides that the Commission may assign its *duties* to any of its members. O.S.A., s. 3(2). Assignment of duties concerning the supervision of investigations, however, is not permitted under the present *Act*, but it is under Bill 7. See the respective sections 3(2). In result, under the present *Act* the report of investigation under s. 21(9) must be made *to* at least a quorum of the Commission (two members).

112 See *supra* text following note 40.

Even if it did, the writer would argue that broad discovery of Commission investigatory materials as of right by respondents in disciplinary proceedings would be appropriate in the interests of full preparation by respondent's counsel. Respondents have much to lose -- their livelihoods -- in these proceedings. The agency might argue, however, that full disclosure of reports of investigation to respondents in administrative proceedings would be inappropriate because much of a given report may recount a great deal of material not relevant to a particular respondent and because investigations range far and wide through the affairs of persons who are not ultimately proceeded against or even considered to have engaged in any improper conduct. There may be, then, considerations both of relevancy and of privacy weighing against disclosure. The first consideration can be met by excision of material clearly not relating to the party to whom disclosure is made. The second consideration, privacy, is harder to deal with. Excision is not here a satisfactory solution because it is not for the one making discovery to determine what leads will be helpful to the party requesting it. The fact that innocent parties' names crop up in investigations in contexts that may be embarrassing or that would compromise reasonable sensitivities about personal privacy is hardly peculiar to the field of securities regulation. It is a fact that should induce prudence -- perhaps even caution -- in the exercise of such extremely broad investigatory powers as an agency like the Securities Commission has, but it is not a decisive argument against limited disclosure to particular persons

whose livelihoods are at stake. To jump ahead a bit,[113] the question when government's activities contemplate an invasion of privacy is "Is it unwarranted?"

Enthusiasm for the possible utility of discovery in the agency adjudicatory context must take account of section 24 of the Ontario Securities Act, repeated exactly in section 14 of Bill 7, which states that "[n]o person, without the consent of the Commission, shall disclose, except to his counsel, any information or evidence obtained or the name of any witness examined" under a formal order of investigation. That means that the decision to disclose the results of formal investigations is squarely within the discretion of the Commission. Apart from the informal disclosure that staff counsel may (or may not) be prepared to make in a given case, this discretion is exercised always in the negative.[114] In the case of R. v. Smith,[115] the defendant appealed his Criminal Code conviction for

113 Infra notes 318-20 and accompanying text.

114 See, e.g., Re W.D. Latimer Co. Ltd. and Bray, supra note 108, 52 D.L.R. (3d) at 166. In that case disclosure was unsuccessfully requested from the Minister (of Consumer and Commercial Relations) to whom the Commission had sent the full report of investigation, as it is obliged to do under s. 22 of the Act "where it appears to the Commission that any person or company may have contravened any provisions of this Act or the regulations or ... the Criminal Code ... ". See generally, Baillie, "Discovery-Type Procedures in Securities Fraud Prosecutions" (1972), 50 Can. Bar Rev. 496 at 502-03.

115 [1963] 1 O.R. 249 (C.A.).

theft of shares upon the ground, inter alia, that the trial judge committed reversible error in declining to order the Crown to produce statements made under oath to Securities Commission investigators by witnesses called by the Crown at the criminal trial. The Court of Appeal held that the trial judge had not erred since, whatever may be the right of a defendant to access to prior sworn statements of witnesses in the possession of the Crown generally, here the statements were made to the Commission; the Commission was neither the Crown nor a party to the prosecution; and the Commission had in fact expressly denied consent to the appellant or his counsel being furnished with the statements.[116]

Section 24, of course, constrains not just Commission employees but "any person". The object, it may be supposed, is to prevent the witnesses themselves from impeding investigations by disclosing material relating to the investigation to other witnesses. Although section 24 operates with respect to formal investigations only, the

116 [1963] 1 O.R. at 270-271. Cf., R. v. Cheltenham Justices, ex parte Secretary of State for Trade, [1977] 1 W.L.R. 95 (Q.B.), which held sworn evidence of A given to an inspector appointed under the Companies Act to be not discoverable by B to enable B to lay the basis for cross-examination of A in a criminal prosecution against B. The decision was made upon the stated ground that the statement of A to the inspector would not be introducible as evidence in the prosecution against B. The Court indicated that it also would be prepared to reach the same result on the basis of a governmental privilege against disclosure of materials gathered in an investigation. This privilege is discussed more fully infra.

oath of office taken by all commission employees enjoins them from disclosure of any information learned in the course of their official duties unless "legally required" to do so.[117]

Assuming that the OSC wished to institute some sort of scheme for discovery in proceedings before it, would it have the power to do so? Under present statutes, it is doubtful that it would. The rule-making power of the Lieutenant Governor in Council in section 147 of the present Securities Act does not include, within its 21 enumerated heads, rules of procedure before the agency. There is however a broad residual head "respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act".[118] The breadth of this category is of only academic interest, however, since there are no rules of procedure now and the rule-making power in Bill 7 contains neither an enumerated head relating to hearing procedures nor a broad residual rule-making clause.[119] While Part II of the Statutary Powers Procedure Act confers upon the Statutory Powers Procedure Rules Committee an oversight responsibility with respect to the practice and procedures of tribunals subject to Part I (and the

117 Public Service Act, R.S.O. 1970, c. 386, s. 10(1).

118 Securities Act, s. 147(u).

119 Bill 7, s. 139. Both the Act and the Bill give as an enumerated head of rule-making power "the practice and procedure of investigations" as opposed to hearings. Securities Act, s. 147(l); Bill 7, s. 139(16).

OSC is such a tribunal), the Act does not confer power upon the tribunals to make rules of procedure. That power must presumably be looked for in the agency's enabling legislation,[120] and the search will be in vain so far as Bill 7 is concerned. In a recent decision in which it declined, at the instance of an issuer's minority shareholders, to enter a cease trading order to prevent the controlling shareholders from taking the issuer "private", the OSC remitted the minority holders to the civil remedies available to them in court under the Ontario Business Corporations Act. As a chief consideration for so doing, the Commission cited "the level of refinement of fact-finding that is attained by the exchange of pleadings, the examinations for discovery, the formal trials and the adversary relationship that characterizes judicial proceedings."[121] By implication, the Commission may have been saying that not only is there in fact no procedure for discovery in its proceedings, but that such procedures would not be appropriate to its functions.

120 See, D.W. Mundell, Q.C., Manual of Practice on Administrative Law and Procedure in Ontario (1972) at 26. In Re Pasquale and Township of Vaughan, [1967] 1 O.R. 417 (C.A.), it was held that the Ontario Municipal Board has the power in proceedings before it to make orders for the production of documents, inspection of such documents and for examination for discovery, but the decision was rendered on the basis of a provision in the Ontario Municipal Board Act to which there is no corresponding provision either in the Securities Act or in Bill 7.

121 In the Matter of Cablecasting Ltd., [1978] OSC Bulletin 37 at 42, 44.

Moving from procedures for discovery broadly to the narrower question of the Commission's power to make, or to authorize its staff to make, voluntary disclosure of investigatory files in a discovery-type of context, one would assume almost automatically the existence of such a power. Caution in so concluding is suggested, however, by a couple of cases involving the federal Restrictive Trade Practices Commission ("RTPC"). In Canadian Fishing Co. Ltd. v. Smith,[122] the Supreme Court of Canada had to consider whether the RTPC was authorized to provide certain parties to a hearing under then-section 18 of the Combines Investigation Act with transcripts of evidence and copies of documents taken by the Director of Investigations and Research in an investigation under that Act. By the terms of section 18 of the Act,[123] the Director, if he was of the opinion that the evidence from the investigation indicated that there had been a violation of the Act's substantive provisions, was to prepare a statement of the evidence and to submit it to the Commission and to "each person against whom an allegation is made therein". The Commission then would convene a hearing to consider the statement and the evidence "at which such persons against whom an allegation has been made shall be allowed full opportunity to be heard". The Commission, however, had no enforcement powers; all that it could do was to publish its

122 (1962), 32 D.L.R. (2d) 641.

123 R.S.C. 1952, c. 314 as amended, s. 18. Section 18 of the present Combines Investigation Act, R.S.C. 1970, c. C-23, as amended by 1974-75-76, c. 76, is substantially the same.

conclusions and/or recommend criminal prosecution to the Minister. In the particular case, the Director had made allegations against a group of fish packing companies in British Columbia, a labour union representing fishermen and certain officials of the union. The Director sent to all of them a single statement of evidence, although the transactions giving rise to the respective allegations against the packers and against the union and its officials were in fact quite separate. The Commission set a hearing date. The union representatives sought access to the transcripts of all the evidence and copies of all the documents obtained in the inquiry. The Commission notified all parties that it proposed to comply with the request for access, and the packers' group brought an action to enjoin release of documents and testimony emanating from them. The Supreme Court held, in a 5-4 decision, that section 18 empowered the Commission to disclose evidence to a party to the hearing but only such evidence as related to allegations against that particular party. To interpret the statute to authorize any wider disclosure would be unjust, the majority reasoned, since the documents and the testimony would be regarded as confidential by the parties submitting them.[124] The dissenting justices held that the

124 But compare, Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners, [1974] A.C. 405 (H.L.), holding that "confidentiality" is not a separate head of evidentiary privilege.

Commission was authorized by the statute to disclose no evidence at all, as opposed to the statement of evidence.[125]

Recently, in Canadian Javelin Ltd. v. Sparling,[126] the Federal Court of Appeal has held that a person appointed by the RTPC under section 114 of the Canada Corporations Act to make an investigation into the affairs of a company may disclose documentary information taken from the company to enforcement agencies in other jurisdictions to the extent necessary to further the purposes of the investigation. The Court denied the company's request for an injunction not because it found any broad power in the investigator to disclose, but rather because it was satisfied that the disclosures in question, to the Securities and Exchange Commission and to the Quebec Securities Commission, were necessary to further the overall purposes of the investigation, which the court took to be protection of the company's shareholders. The court noted that the documents in question were confidential only in the sense that they would not ordinarily be

125 The dissenters relied heavily on earlier cases holding that the RTPC was an administrative rather than a judicial body. As such, its powers were strictly limited to those conferred by the legislation. The "administrative" characterization as applied by the earlier cases arose from the fact that the RTPC's determinations had no binding effect. Advance Glass & Mirror Co. v. A. G. Can., [1950] 1 D.L.R. 488, 12 C.P.R. 94, [1949] O.W.N. 451 (H.C.J.); Re Imperial Tobacco Co.,[1939] 3 D.L.R. 750, [1939] O.R. 213 (H.C.J.). The dissenting justices' conclusions would not, therefore, appear to be applicable to a body such as the OSC.

126 Judgment dated July 28, 1978, not yet reported.

available to the general public or to shareholders and not in the sense of being trade secrets or confidential financial information that could be of use to competitors.

## 2. Other Litigation: The Doctrine of Crown Privilege

Consideration of the matter of discovery in the context of the OSC's adjudicatory process invites consideration of the status of information in the possession of the Commission when such information is sought by a private party in litigation in court.

At common law the Crown has a right not to produce documentary or testimonial information in court. This prerogative, traditionally (though misleadingly) called "Crown privilege",[127] is recognized

127 The term "privilege", while widely used to describe the Crown's prerogative in this regard, is said to be a misnomer since the right is not personal, the public interest which it allegedly serves is not waivable and a court should enforce the right on its own motion in appropriate circumstances. Gaming Board for Great Britain v. Rogers [1973] A.C. 388, 400 (Lord Reid), 406 (Lord Pearson), 407 (Lord Simon), 412 (Lord Salmon); Duncan v. Cammell, Laird & Co. Ltd., [1942] A.C. 624, [1942] 1 All E.R. 587. Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto: 1974) at 239. On the subject of Crown privilege generally, see also Schiff, Evidence in the Litigation Process (Toronto: 1978) v. 2 at 1048-73; Glasbeek, Evidence Cases and Materials (Toronto: 1977) at 301-13; Law Reform Commission of Ontario, Report on the Law of Evidence (Toronto: 1976) at 221-34; Bushnell, "Crown Privilege" (1973), 51 Can. Bar Rev. 551; Clark, "Crown Privilege", [1966] Cur. Leg. Probs. 84; Koroway, "Confidentiality in the Law of Evidence" (1978), 16 Osgoode Hall L.J. 361 at 363-79.

also in various statutes that deal with the subject of Crown information in the litigation process.[128] It is said not to be in the public interest for the Crown to disclose information if such disclosure would imperil national security or the conduct of international relations, or would discourage the rendering of full and frank advice within the government, or would render it more difficult in the future for the government to collect from private sources information that the government requires for discharge of its responsibilities.

While the question may not be entirely free from doubt, it would appear that a regulatory body such as the Ontario Securities Commission is "the Crown" with regard to questions of Crown privilege. The case of R. v. Smith, discussed earlier herein,[129] which held that the Commission was not the Crown for purposes of discovery of prior sworn witness statements that the Crown would be obligated to give in a criminal prosecution, is, with respect, wrong. The OSC assuredly is not a Crown corporation. There do not exist in Ontario -- and it is doubtful that there could exist in a parliamentary system -- independent regulatory agencies in the

128 E.g. Federal Court Act, S.C. 1970-71-72, c. 1, s. 41; Evidence Act, R.S.O. 1970, c. 151, s. 31; Proceedings Against the Crown Act, R.S.O. 1970, c. 365, s. 12.

129 Supra text accompanying note 115.

American sense.[130] The Commission is organized as a department of the Ministry of Consumer and Commercial Relations, and it reports to that Minister even though in its adjudicatory role the Commission appears to function in a manner independent of ministerial control.[131] The House of Lords in two recent English cases has extended the doctrine of Crown privilege to information in the possession of agencies whose status as ministerial departments is a good deal less certain than that of the Ontario Securities Commission.[132]

Assuming that a claim of Crown privilege is properly asserted by affidavit -- and in the case of the Securities Commission that might mean the affidavit of the Minister rather than the Chairman of the Commission[133] -- the question then becomes whether the affidavit that disclosure is not in the public interest will be treated as conclusive, or whether the courts will themselves undertake

130 Furthermore, in the United States "executive privilege" can be invoked by the heads of federal regulatory agencies that are as a matter of constitutional theory independent of both the executive and the legislature. Infra, note 327.

131 On the relationship between the Commission and the Ministry see generally, Johnston, supra note 51, at 72-77.

132 Gaming Board for Great Britain v. Rogers, supra note 127; D. v. National Society for the Prevention of Cruelty to Children, [1977] 2 W.L.R. 201, [1978] A.C. 171. In Conway v. Rimmer [1968] A.C. 910, 953, Lord Reid pointed out that the police department, which had possession of the documents there in issue, was not a servant of the Crown and did not take its orders from the government.

133 Sopinka and Lederman, supra note 127, at 257 n. 931.

examination of the information to determine the impact upon the public interest of making it available to the litigant. The cases are by no means consistent, and the procedural context in which the request for information arises may be important. There appears to be emerging, however, a predominant judicial view in Canada that the Minister's affidavit is not conclusive and that the court may examine the documents[134] in camera to decide for itself the validity of the Minister's assertion of the public interest in non-disclosure, which must in any case be weighed against the public interest in the accuracy of the fact-finding process in litigation.[135] Where,

134 Where the privilege asserted is against giving oral evidence, the court must weigh the assertion of public interest against the questions sought to be propounded. See, e.g., Homestake Mining Co. v. Texasgulf Potash Co. (1977), 76 D.L.R. (3d) 531 (Sask. C.A.).

135 R. v. Snider, [1954] S.C.R. 479, [1954] 4 D.L.R. 483 (disclosure of income tax returns to defendant in a criminal prosecution ordered); Gagnon v. Quebec Securities Commission, [1965] S.C.R. 73, 50 D.L.R. (2d) 329 (disclosure of letter to Quebec Securities Commission ordered); Homestake Mining Co. v. Texasgulf Potash Co. (1977), 76 D.L.R. (3d) 521 (Sask. C.A.); Manitoba Development Corp. v. Columbia Forest Products Ltd. [1973] 3 W.W.R. 593 (Man. Q.B.); Re Board of Moosomin School Unit No. 9 and Gordon (1972), 24 D.L.R. (3d) 505, [1972] 3 W.W.R. 380 (Sask. Q.B.), rev'd on other grounds, 26 D.L.R. (3d) 510, [1972] 5 W.W.R. 375 (C.A.); Huron Steel Fabricators (London) Ltd. v. M.N.R. (1973), 31 D.L.R. (3d) 110 (Fed. Ct. Tr. Div.), aff'd., (1973), 41 D.L.R. (3d) 407 (C.A.) (income tax returns ordered disclosed under s. 41, Federal Court Act); Re Blais and Andras (1973), 30 D.L.R. (3d) 287 (F.C.A.) (disclosure of report of Supt'd. of Bankruptcy to Registrar General of Canada on applicant's discharge of trusteeships ordered under s. 41 of the Federal Court Act); see also, Churchill Falls (Labrador) Corp. v. The Queen (1972), 28 D.L.R. (3d) 493 (Fed. Ct. Tr. Div.). But see: Reese v. The Queen, [1955] Ex. C.R. 187; Re Lew Fun Chaue, [1955] O.W.N. 821, [1955] 5 D.L.R. 513 (H.C.J., master); Gronlund v. Hansen (1968), 68 D.L.R. (2d) 223, 64 W.W.R. 74 (B.C.C.A.); Miles v. Miles [1960] O.W.N. 23 (H.C.J.).

however, the ground for non-disclosure as stated by the Minister is the public interest in the conduct of national defence and foreign affairs, there will be no in camera inspection and the Minister's affidavit will be treated as conclusive.[136] In substance, the majority Canadian view appears to be that legislated in the Federal Court Act (which, however, since it relates only to the Crown in right of Canada,[137] would not apply to documents in possession of a provincial securities commission). Section 41(1) states that:

> When a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it

136 For many years the leading case in the area was Duncan v. Cammell, Laird & Co. Ltd., [1942] A.C. 624, [1942] 1 All E.R. 587 (H.L.). There, the representatives of seamen killed when a submarine failed to resurface from her submergence tests in Liverpool Bay brought actions against the shipbuilders and others. Plaintiffs sought discovery of the specifications of the submarine and the First Lord of the Admiralty ordered the respondents not to produce the requested documents. The House of Lords per Lord Simon in very broad language held that a Minister's affidavit asserting Crown privilege was conclusive upon the courts. A quarter century later, in Conway v. Rimmer, [1968] A.C. 910, [1968] 1 All E.R. 874, a probationary police constable sought production of his probationary reports in connection with an action for malicious prosecution brought by the former constable against one of his superiors. The House of Lords rejected the broad holding of Duncan and held that the court was entitled to inspect the documents to satisfy itself of the validity of the objection to production that had been taken by the Home Secretary. All of the Lords in Conway stated, however, that they were satisfied that Duncan had been decided correctly on its facts.

137 S.C. 1970-71-72, c. 1, s. 2(f).

> concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit. 138

Subsection (2) then states that the Minister's affidavit shall be conclusive where the asserted ground of non-disclosure is injury to international relations, national defence or security or to federal-provincial relations or preservation of a confidence of the Cabinet.

Where the court does make an in camera inspection, it will attempt to decide whether the public interest in confidentiality in the particular circumstances outweighs the public interest that all relevant evidence should be disclosed. Where the privilege is asserted on the basis that disclosure would compromise the government's ability to collect needed information from outside sources, the Federal Court of Appeal has suggested that the privilege is less well-founded where the information is provided under statutory compulsion rather than on a strictly voluntary basis.[139]

In Conway v. Rimmer, Lord Reid expressed considerable skepticism as to the validity of arguments for non-disclosure of government information based upon the notion that frank and free advice would not be rendered within agencies unless the authors of advice knew

138 S.C. 1970-71-72, c. 1, s. 41(1).

139 Minister of National Revenue v. Huron Steel Fabricators (London) Ltd. (1973), 41 D.L.R. (3d) 407.

that it would never be made public.[140] Rather, Lord Reid said,

> the most important reason [against disclosure] is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind. 141

His Lordship suggested that a line should be drawn between true policy-making documents, the whole class of which would be exempt from compelled disclosure in litigation, and routine reports, the attempted withholding of which would be subjected to a quite critical judicial examination on a case-by-case basis.

Lord Upjohn in Conway v. Rimmer observed that he would be hesitant to allow the government to keep whole classes of documents confidential on the sole basis of candour "pure and simple". His Lordship observed:

> ... I find it difficult to justify this when those in other walks of life which give rise to equally important matters of confidence in relation to security and personnel matters as in the public service can claim no such privilege. 142

140 [1968] A.C. at 952.

141 Id.

142 [1968] A.C. at 995, quoted by Thurlow, J.A. in Re Blais and Andras (1972), 30 D.L.R. (3d) 287 at 292. At issue in Conway v. Rimmer was disclosure of supervisors' reports on a probationary police constable.

It may be questioned whether that candour which results from knowing that the subject of one's comments will never be able to see them is always desirable in government.[143] In many situations where government officials deal with private citizens, accuracy may be a virtue more highly to be prized than candour. Among those situations would be intra-agency memoranda suggesting that action should be taken against a licensee.[144]

The litigation context -- civil or criminal -- in which the document or oral testimony is sought and the Crown's status as a party or not will be important factors in the determination of whether or not Crown privilege is upheld, and there are different statutory provisions that relate to the different contexts. In the leading Canadian case on the ultimate authority of the courts to determine the validity of an assertion of Crown privilege, R. v. Snider,[145] both Justices Rand and Kellock emphasized that they were called upon to consider the question only in relation to a criminal prosecution, and at least one Canadian court in a later case declined to extend

143 See Koroway, supra note 127, 16 Osgoode Hall L.J. at 367. This matter is pursued further, infra, text accompanying note 345.

144 E.g., Re Blais and Andras, supra note 142.

145 [1954] S.C.R. 479, [1954] 4 D.L.R. 83.

the rule of judicial supervision announced in Snider to the civil litigation context.[146]

As the law now stands, the Ontario Securities Commission is not an entity suable in tort. Nor is the Crown liable under the Proceedings Against the Crown Act[147] for torts committed by the Commission, its members or employees, in connection with the administration of the Securities Act. Under Bill 7, it appears that the situation will be much more complicated. It is submitted that after the promulgation of Bill 7 and in light of the Proceedings Against the Crown Act:

> (1) The Commission, but not the Crown, will be liable for torts committed by the Commission otherwise than "in good faith";
>
> (2) The Crown, but not the Commission, will be liable (vicariously) for torts committed by the Commission "in good faith";
>
> (3) Members and employees of the Commission will be liable for torts committed by themselves, and not ascribable to the Commission, otherwise than "in good faith";
>
> (4) The Crown will be vicariously liable for such torts; and
>
> (5) Nobody will be liable for torts committed "in good faith" by members and employees of the Commission and not ascribable to the Commission.

146 Miles v. Miles [1960] O.W.N. 23 (H.C.J.). But there is only one reported Canadian case after the decision of the House of Lords in Conway v. Rimmer, in which the court declared itself to be bound by the Minister's assertion of privilege without more. Gronlund v. Hansen (1968), 64 W.W.R. 74, 68 D.L.R. (2d) 223 (B.C.C.A.).

147 R.S.O. 1970, c. 365.

The reasoning in support of the above propositions is set out in the note.[148]

Evidentiary matters in proceedings against the Crown are governed by section 12 of the Proceedings Against the Crown Act, which provides

148 That the Ontario Securities Commission is not an entity suable for damages was decided in Westlake v. The Queen, [1971] 3 O.R. 533, 21 D.L.R. (3d) 129 (H.C.), affirmed, [1972] 2 O.R. 605, 26 D.L.R. (3d) 273 (C.A.), affirmed, [1973] S.C.R. vii, 33 D.L.R. (3d) 256n. Commission members and employees enjoy a practical exemption from tort liability by the terms of s. 145(1) of the Securities Act, which provides that except with the consent of the Minister, no action lies against "a member of the Commission, a representative of the Commission or the Director ... or a person ... proceeding under the written or oral direction of anyone of them ... in respect of any act or omission in connection with the administration or the carrying out of the provisions of this Act or the regulations". Since no individual agent or servant of the Crown can be liable for such an act, the Crown has no vicarious liability either. Proceedings Against the Crown Act (hereafter "PACA") R.S.O. 1970, c. 365, ss. 5(1)(a), 5(2), 5(4); S.L. Goldenberg, "Tort Actions Against the Crown in Ontario", [1973] L.S.U.C. Special Lectures 341, 357-65.

Bill 7, s. 138(1) will broaden the liabilities. It provides that "no action or other proceeding for damages shall be instituted against the Commission or any member, ... officer, servant or agent of the Commission for any act done in good faith in the performance or intended performance of any duty or in the exercise or intended exercise of any power under this Act or a regulation, or for any neglect or default in the performance or exercise in good faith of such duty or power" (emphasis added). The clear implication is that the Commission itself and its members and servants will be liable for their respective torts committed otherwise than in good faith.

Now let us look at the vicarious liability of the Crown after the promulgation of Bill 7. Section 5(1)(a) PACA sets out the general rule that the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject in respect of a tort committed by any of its (cont'd)

that in proceedings against the Crown, "the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest". The Ontario Law Reform Commission has expressed the view that this provision is procedural only and does not override the position arrived at by Canadian courts that they are the ultimate arbiters of

148 (cont'd) servants or agents. There are, however, numerous exceptions to this general statement of liability. One of these is s. 5(2), which provides that the Crown is not liable for the act or omission of its servant or agent if such person would not himself be liable. Section 138(3) of Bill 7 provides that subsection (1) thereof does not relieve the Crown of liability by virtue of the operation of PACA, s. 5(2). So far, then, the Crown after Bill 7 would appear to be liable for all the torts of the Commission, its members and employees in carrying out or not carrying out their responsibilities under the Bill. Subsection (4) of s. 5, PACA, the effect of whose operation is in no way limited by Bill 7, states, however, that "an enactment that negatives or limits the liability of a servant of the Crown in respect of a tort committed by that servant applies in relation to the Crown as it would have applied in relation to that servant if the proceedings against the Crown had been proceedings against that servant". Section 138(1) of Bill 7 is such an enactment and, it is submitted, the members and employees of the Commission -- but not the Commission itself -- are servants of the Crown. See generally, Goldenberg, *supra*, at 366-83. Therefore, the result is that the Crown will not be liable for torts of the members or employees of the Commission (to be distinguished from torts of the Commission) with respect to which the members or employees are not themselves personally liable, that is, torts committed in good faith.

What is the Crown's vicarious liability for torts of the Commission itself? For causes of action enforceable against an agency of the Crown, the Crown itself is not liable by the express terms of PACA, s. 2(2)(b). Therefore the torts committed by the Commission otherwise than in good faith are actionable against the Commission only. Torts committed by the Commission in good faith, however, are not actionable against the Commission, and there is no provision of the PACA that would exclude the Crown's vicarious liability under s. 5(1)(a).

the propriety of the assertion of Crown privilege in a given case.[149] "Proceedings against the Crown" as used in section 12 presumably refers only to proceedings arising under the Act. If so, then section 12 would not govern proceedings against the Crown's agents and servants, such as the Securities Commission, and its members and employees, which will arise under provisions of Bill 7. Discovery and other evidentiary matters in proceedings under Bill 7 will, insofar as Crown privilege is concerned, be governed by common law rules. So also with applications for judicial review under the Judicial Review Procedure Act.[150]

Proceedings to which the Crown is not a party are governed in relevant respect by section 31 of the Evidence Act (Ont.) which states that where a document is in the official possession of a member of the Executive Council or of the head of a department of the public service, a deputy who has the document in his personal possession may, if called as a witness, plead the privilege.[151]

149 Ontario Law Reform Commission, Report on the Law of Evidence (1976) at 231. This conclusion was drawn from the opinion of Fauteux, J. in Gagnon v. Quebec Securities Commission, supra note 135. In that case disclosure was ordered on the narrow ground that the assertion of privilege failed to comply procedurally with s. 332 of the Quebec Civil Code which stated that certain evidence "cannot be compelled". Fauteux, J. stated at some length, however, that even if the assertion of privilege had been made in proper form, it would have been subject to ultimate review by the court.

150 S.O. 1971, c. 48.

151 R.S.O. 1970, c. 151.

This provision, too, has been said by the Law Reform Commission to be procedural only.[152]

It will be recalled that section 24 of the Securities Act provides that "no person, without the consent of the Commission, shall disclose, except to his own counsel, any information or evidence obtained or the name of any witness examined or sought to be examined" pursuant to a formal order of investigation.[153] If such information were sought in a litigation context and the Commission did not consent, would that put an end to the matter? R. v. Smith[154] suggests so. One would hope, however, that courts would be prepared to look at the purpose of section 24, which appears to be the protection of the Commission's investigatory process from the impediments that would be created by the exchange of information among prospective witnesses and targets. Where such danger is not present because, for example, the investigation and the Commission's use of its results for enforcement purposes have been completed, the statute should not be treated as conclusive against a bona fide request for discovery. Cessant ratione legis, cessat et ipsa lex.

There is an additional reason to doubt the conclusiveness of section 24 in the context of a defendant's motion to produce prior sworn

152 Report on Evidence at 231.

153 See also Bill 7, s. 14.

154 Supra text accompanying notes 115, 116, 129.

witness statements in a criminal prosecution. The witness statement may be admissible in the criminal trial on the issue of credibility as a prior inconsistent statement. It is highly doubtful that a provincial legislature is constitutionally competent to determine in effect what evidence concededly admissible shall be produced for a criminal trial.[155]

With respect to production in civil litigation, section 24 would seem to be of conclusive effect -- so long as the court was satisfied that the information as to which a privilege was asserted came within the section's terms.[156] Some confidentiality statutes prohibit disclosure of information to any person "not legally entitled thereto".[157] Obviously the question of who is "legally entitled to" government information is for the courts. Just as clearly, it would

155 Reference Re Legislative Privilege (1978), 18 O.R. (2d) 529, 541-43 (C.A.).

156 In the recent case of Homestake Mining Co. v. Texasgulf Potash Co. (1977), 76 D.L.R. (3d) 521, the Saskatchewan Court of Appeal upheld the trial court which had ordered a government mining official to give oral testimony in the face of an assertion of Crown privilege. Section 6 of the Mineral Resources Act, R.S.S. 1965, c. 50, was to the effect that without the permission of the Minister "no person employed by the department shall disclose any information obtained by him through his employment". The courts found that the information sought from the witness did not come to him in his capacity as a government employee but related rather to conditions generally known to those active in the potash industry.

157 Statutes of this type were involved in R. v. Snider, [1954] S.C.R. 479 (Income Tax Act) and in Pocock v. Pocock [1950] O.R. 734 (H.C.J.) (Corporations Tax Act).

seem that a statute that said that information "is not compellable in any proceeding"[158] would leave nothing for a court to decide other than that the information sought was covered by the provision. Section 24 of the Ontario Securities Act seems closer to the latter type of provision than to the former.

In addition to the privilege available to the Ontario Securities Commission in its status as the Crown, presumably the privileges for confidential attorney-client communications and for documents prepared in anticipation of litigation would be available to the Commission in appropriate circumstances.[159] While the writer has found no Canadian case on point, he would think that these privileges would be available to the government on a footing equal to their availability to private parties. Such is the law in England[160] and the United States.[161]

158 Examples are given in Bushnell, "Crown Privilege" (1973), 51 Can. Bar Rev. 551 at 554.

159 It is unclear in Canada whether the privilege attaching to documents prepared in anticipation of litigation is an aspect of attorney-client privilege or is separate therefrom, as it clearly is in the United States under the doctrine in Hickman v. Taylor (1947), 329 U.S. 495. See Flack v. Pacific Press Ltd. (1970), 14 D.L.R. (3d) 334, 75 W.W.R. 275 (B.C.C.A.); Strass v. Goldsack [1975] 6 W.W.R. 155, 58 D.L.R. (3d) 397 (Alta. S.C., App. Div.). The fullest discussion of the issue is in a comment on the Strass case in (1975), 54 Can. Bar Rev. 422 (S.N. Lederman).

160 Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Comm'rs., [1974] A.C. 405.

161 See cased cited infra note 328; see also Advisory Committee's Note to Standard 503, Rules of Evidence for the U.S. Courts and Magistrates, in Weinstein's Evidence, v. 2, at 503-4.

## D. Rule-Making

The OSC is remarkable for the degree of openness with which it conducts proceedings in the nature of rule-making in the absence of any statutory or common law compulsion of openness. By "proceedings in the nature of rule-making" is meant both the formal rule-making power of the Lieutenant Governor in Council under the Securities Act[162] that is in fact exercised upon the recommendation of the OSC, and also the issuance by the Commission itself of policy statements which, although in legal theory they are not of binding effect,[163] are in fact treated as very close to binding by securities industry participants[164] and by the Commission itself.[165]

With respect both to regulations to be submitted to Cabinet and proposed policy statements, the Commission generally publishes in its Weekly Summary a notice of the matter under consideration and it asks

162 Securities Act, s. 147; Bill 7, s. 139.

163 Supra note 74.

164 For example, the operations of the mutual fund industry are governed in many important respects by the National Policy Statements.

165 See, e.g., the treatment by the Commission of the timely disclosure policy statements in In the Matter of Harold P. Connor, [1976] OSC Bulletin 149.

for written submissions by a certain date.[166] On the more important matters the Commission will convene a public hearing,[167] and, with respect to policy statements, it will frequently publish a draft and solicit further comments.[168] In sum, the Commission attempts to provide quite full opportunity to concerned parties to make input into the rule-making process.

The meaningfulness of the opportunity that a party has to participate in any proceeding will often be a function of his ability to respond to other parties' submissions. Recent OSC policy in this regard has been to announce at the time submissions are invited that all submissions will be available for public inspection unless confidential treatment is specifically requested by a party making a submission. From time to time in the Weekly Summaries the Commission will publish a list of those parties who have made

166 See, e.g., Weekly Summaries for weeks ending August 3, 1978 (soliciting comments on draft regulations under Bill 7 on a variety of topics); August 11, 1978 (soliciting comments on procedures for the registration of chartered banks as securities dealers under Bill 7); August 25, 1978 (soliciting comments on the desirability of discontinuing publication of information appearing on Forms 11 & 12); October 13, 1978 (soliciting further comments on the activities of non-resident, non-registered securities firms in Ontario).

167 E.g., hearing of October 2, 1978 on activities of non-resident, non-registered securities firms in Ontario.

168 This procedure was followed recently in connection with Policy Statements 3-02 on "Mining Financing" and 3-37 on "Going Private".

non-confidential submissions on a given topic under consideration and invite their examination at the Commission's offices.[169] Very recently the Commission has attempted to discourage the proliferation of requests for confidentiality with the following notice:

> The Commission recognizes that it may sometimes be necessary for persons making a written submission in response to a request for comments to request that it be treated as confidential. For example, it may contain sensitive statistical information. However, the Commission hopes that requests for confidentiality will be restricted, for example, by including confidential information in a separate submission or schedule and limiting the request to that separate document. Further, the Commission wishes it understood that it will take into account the willingness of the person concerned to make a submission available for public debate in determining what weight should be attached to the arguments advanced. Of course, other considerations may apply where the submissions are made in connection with a disciplinary or other proceeding of a quasi-judicial nature.[170]

While it would be preferable in the interests of public informed rule-making for there to be no confidential submissions because no one can respond to that of which he is ignorant, as a practical matter the Commission may have done about the best it can do in its policy on confidentiality. If the Commission had an unrelenting policy that all written submissions in connection with rule-making were to be available for public inspection, the result would be either that parties who wanted confidentiality would approach

169 See, e.g., Weekly Summaries for weeks ending August 31, 1978 and September 29, 1978.

170 Weekly Summary for week ending August 31, 1978, p. 6A.

commissioners orally and informally or that the Commission would proceed in the absence of some relevant facts. If one had to choose between rule-making that is fully informed and rule-making that is fully public, it is not certain that the latter is preferable. Oral approaches to the commissioners probably could not be excluded even if it were desirable to do so.[171] And it would seem totally perverse to attempt to cut off agency regulators from contact with the persons and entities regulated. In sum, the present Commission policy appears reasonably well-calculated to produce generally open rule-making upon an adequate written and public record.

One can only speculate as to parties' reasons for wishing rule-making submissions to be confidential. Perhaps some submissions by registrants would reveal market share data not otherwise publicly available. Since securities industry registrants are not publicly owned, they are not subject to the public financial reporting requirements of companies statutes. Stock exchange rules, however, obligate members to issue statements of their financial position to their customers upon request.[172]

171 As will be suggested later in this paper, however, it might be feasible for there to be a requirement of public access to a log or a summary of informal interactions between high agency functionaries and industry representatives.

172 TSE by-law 18.05A, CCH Can. Sec. L. Rep. para. 89-754a. Generally speaking the OSC is not in possession of the financial statements of most registrants because most of them are members of one or more of the self-regulatory organizations, and the responsibility of conducting audits of such firms to ensure their compliance with the net capital rules that all registrants must observe devolves upon the self-regulatory organization and not the Commission itself.

(cont'd)

Commission personnel have also expressed the view to the writer that confidential submissions in rule-making proceedings may occasionally be necessary to protect a registrant who wishes to make a submission that would be contrary to the position taken by, for example, a self-regulatory organization of which the registrant was a member. One would expect, however, that members of the securities industry are sufficiently sophisticated to appreciate that a dollar is a dollar and not to be scandalized when one of their number takes a position in his individual, rather than the collective, self-interest. That is capitalism. In the recent inquiry into fixed commission rates, for example, numerous TSE member firms filed submissions with the OSC that espoused a position (negotiated rates) opposite from that of the Exchange itself (fixed rates). The writer is informed that since August 1978, when the Commission adopted its present policy on confidential submissions in rule-making, there have been only one or two such submissions. This is remarkable in light of the large number of invitations for submissions that have been published in this period in connection with rules under Bill 7.

172 (cont'd) Securities Act, s. 31; Bill 7, ss. 19, 20. The Commission can, however, obtain the financial statements of any registrant if it wishes.

The Commission does regularly receive the financial statements of the very largest dozen or so Canadian-owned securities dealers because these firms have been approved by the Bank of Canada as money market dealers, and the regulations governing the growth of foreign-controlled registrants limit annual increments in their capital to a percentage figure equal to the growth rate of the money market dealers. See ss. 6a-6f of Regulations under the Securities Act, R.R.O. 1970, Reg. 794 as amended by Reg. 600/74.

E. Oversight of the Toronto Stock Exchange

This section is concerned with three types of OSC supervision of the Toronto Stock Exchange: review of an Exchange decision at the instance of a "person aggrieved"; review at the Commission's own initiative "where it appears to be in the public interest" of any "direction, order, determination or ruling" of the Exchange; and *ad hoc*, informal intervention by the Commission into the affairs of the Exchange.

The four instances to date in which the OSC has reviewed under section 140(3) a decision of the TSE at the instance of a person aggrieved have involved either membership or disciplinary decisions of the Exchange, and the review has therefore been upon a record compiled before the Exchange.[173] Since the procedure before the Commission under section 140(3) is a "hearing and review", new

173 The cases are cited at note 69 *supra*. Section 140(3) of the *Securities Act* provides that "any person or company who feels aggrieved by any direction, order or decision ... of a stock exchange in Ontario may apply to the Commission for a hearing and review thereof". In Bill 7, s. 22(3) the expression "directly affected" has been substituted for "who feels aggrieved". In either case, the right to "apply for" a hearing and review is less than an entitlement to a hearing and review, as exists with respect to decisions of the Director of the Commission. Compare Bill 7 s. 22(3) with s. 8(2). See, *In the Matter of Hill and the Vancouver Stock Exchange* (1975), CCH Can. Sec. L. Rep. para. 70-077 (Corp. and Fin. Serv. Comm. of B.C.).

evidence could be introduced at the Commission stage,[174] although this has not in fact occurred to date. The Commission's function would appear to be a fairly straightforward adjudicatory one, and no particular access to information questions are implicated at the Commission review stage.

The more generalized type of review over the Exchange contemplated by subsection (2) of section 140 is exemplified by the Commission's review of Exchange decisions setting commission rates. The Commission early committed itself to conduct such review by way of public hearings and specifically rejected the Exchange's submission that review should be by way of private consultation.[175] In the last five years the Commission has reviewed the Exchange's rate structure by way of public hearings as many times.[176] In 1976 the Commission reviewed not just the level of rates but the continuing viability of the very concept of fixed rates in a lengthy hearing in which interested members of the public were invited to -- and did -- make

174 Re The Securities Commission and Mitchell, [1957] O.W.N. 595, 598 (C.A.).

175 [1967] OSC Bulletin 15.

176 [1973] OSC Bulletin 107; [1974] OSC Bulletin 199; [1975] OSC Bulletin 278; [1976] OSC Bulletin 289; [1977] OSC Bulletin 157. The only other example known to the writer of review of a TSE rule or by-law by the OSC under s. 140(2) was in 1970 in connection with the exercise by the Exchange of certain controls over the affairs of listed companies. In the Matter of By-law 24 and Ruling 49 of the Toronto Stock Exchange, [1970] OSC Bulletin 9 (Feb.).

written and oral submissions.[177] So far as the writer can determine, all of the written submissions were available for perusal by all of the parties (including intervenors) except for one document, a detailed report of a task force of the Quebec Securities Commission that took a position against maintenance of fixed rates. The OSC decision was to maintain the regime of fixed rates. Very likely this document was accorded confidential status by the OSC because that was its status within the Quebec Securities Commission.

Finally there are *ad hoc*, informal interventions by the OSC into the affairs of the TSE. Presumably there is constant informal interaction on a variety of topics between the two bodies. The Commission's oversight function is enunciated not only in the *Securities Act* but also in the *Toronto Stock Exchange Act*.[178] Occasionally the subject of the interaction surfaces in the financial press or in the publications of the Commission itself, as a few years ago in connection with take-over bids. The *Securities Act* exempts from various rules governing take-over bids such bids as are made through the facilities of an exchange.[179] In 1974, when Abitibi Paper Co.

177 *In the Matter of Part XV of the By-laws of the Toronto Stock Exchange* [1976] OSC *Bulletin* 289. Among the public participants was the Director of Investigation and Research under the (federal) *Combines Investigation Act*.

178 R.S.O. 1970, c. 465, ss. 4(3), 12.

179 *Securities Act*, s. 81(b)(ii); Bill 7, s. 88(2)(a).

made a cash bid on the TSE for control of Price Co., the Chairman of the OSC was contacted by an official of a large trust company with the complaint that the trust company had insufficient time under the terms of the bid to ascertain the desires with respect thereto of the beneficial owners of shares registered in the trust company's name. The OSC Chairman contacted the Exchange Chairman and Abitibi officials, and Abitibi was prevailed upon to extend the time during which its offer would be open for acceptance by shareholders. A presumably unanticipated result of the Commission Chairman's intervention was that during the extended period, another suitor of Price made a counter-offer at a price substantially in excess of the Abitibi offer. Ultimately Abitibi was the victor with a counter counter-offer at a premium of about 40% over its initial offer. The ad hoc intervention of the Securities Commission thus resulted in the transfer of several million dollars from Abitibi to the shareholders of Price.[180]

As a result of the Abitibi-Price experience, Canadian securities exchanges began seriously to consider adoption of rules to govern take-over bids made through their facilities. The Montreal and Vancouver exchanges adopted rules of procedure for such transactions fairly quickly, but Toronto delayed for a long time, apparently due

180 See "A Securities Chief's Lessons from Abitibi", Financial Post, December 28, 1974, p. 3.

to disagreement between the Commission and the Exchange as to what would be adequate rules. In the midst of the impasse, Cornat Industries Ltd. made a bid for the shares of Bralorne Resources Ltd. Cornat had been informed by the OSC that the bid would not be allowed to proceed on the TSE, since that exchange had yet to adopt rules governing such bids. Cornat therefore proceeded through the facilities of the Vancouver Stock Exchange, where Bralorne shares were also listed. In reaction the OSC suspended trading in the shares of Bralorne but then lifted the cease trading order when it became apparent that the principal effect of the order was to prevent Ontario shareholders of Bralorne from making a disposition of shares that many of them considered beneficial.[181] As a result of the failure of the TSE to have promulgated take-over bid rules, its members lost business to British Columbia brokers in the Cornat-Bralorne deal. Shortly thereafter the Commission and the Exchange reached agreement on rules for bids on the Exchange, and rules were adopted by the Exchange.[182]

In each of the above two cases, the existence of a statutory jurisdiction for the OSC's intervention into the affairs of the

181 See In the Matter of Bralorne Resources Ltd., [1976] OSC Bulletin 258.

182 TSE By-laws s. 23.01 et seq., reprinted at CCH Can. Sec. L. Rep., v. 3, para. 90-126.

Exchange was highly doubtful,[183] but in general, informal contact and even pressure between the Commission and the Exchange is to be expected if the Commission is to be vigilant in its efforts to ensure honest and equitable securities markets. The Cornat-Bralorne intervention was publicized by the Commission itself in its opinion lifting the cease trading order on Bralorne shares.[184] The Abitibi intervention was made public in an interview given to a Financial Post reporter by the then-Chairman of the OSC.[185] There is a certain happenstance character to whether or not these interventions become matters of public knowledge. In the freedom of information context, that raises the issue whether it is sufficient to mandate disclosure of certain types of government records or whether it is necessary affirmatively to obligate agencies to make records of certain types

183 The Act in s. 81(b)(ii) gave a flat exemption from the rules governing take-over bids to ones "to be effected through the facilities of a stock exchange". There is no requirement in the Act (contrast Bill 7, s. 88(2)(a)) that such stock exchange should have any particular rules governing the situation; it was not even required that the stock exchange be one recognized by the Commission. There were no regulations or even policy statements at relevant times that required exchanges to have such rules. The Commission's power to suspend trading in an issuer's shares, use of which was made in Cornat-Bralorne and threatened in Abitibi-Price, should be reserved, it is submitted, for derelictions on the part of the issuer, as, for example, failure to comply with periodic disclosure obligations, and not used to deny an exemption clearly granted in plain words by the Act itself. Predictability has some value in the law, even in the law governing a highly regulated industry.

184 Supra note 181.

185 Supra note 180.

of activity. The written record, if any, of the Abitibi-Price intervention by the OSC must be very sketchy. Since that was a situation where the Commission had a very major and direct impact upon the securities markets, public revelation of the Commission's role, and therefore the possibility of public assessment, should not have had to depend upon the generosity of the Commission Chairman in granting interviews. In short, it is submitted that the Commission should publicly memorialize those of its activities, or the activities of its most important functionaries, that are at once non-routine, likely to have important impact in the securities markets and not likely to be revealed in formal opinions or rules of the Commission.

## F. Informal Meetings with Industry Representatives

Just as informal inter-actions with the Exchange are entirely appropriate to the Securities Commission's discharge of its responsibilities, so also we would expect that commissioners and staff members would meet frequently with industry representatives and professionals whose businesses are intimately connected with the issuance and trading of securities. About the last thing that would be desirable is to have the Commission insulated from those whose affairs it regulates.

There is, however, one type of interaction between high level Commission staff or the Chairman or Vice-Chairman on the one hand, and representatives of the regulatees on the other, that presents somewhat troublesome questions from the perspective of appropriate openness and accountability in government. That relates to meetings with securities issuers and their professional representatives in which Commission representatives indicate their concurrence with the issuer's view that a particular provision of the securities laws do not apply to a given set of facts. There is something of a tradition of oral exemptions in Ontario.

For example, relevant policy statements promulgated by the Commission generally obligate issuers to make immediate public disclosure of changes in the issuer's affairs that would be likely to affect the market price of their securities.[186] The policy statements recognize that in certain cases the attainment by an issuer of valid business objectives might be compromised by public disclosure and that in such cases a delay in disclosure may be appropriate. In a recent situation, a large Canadian industrial company whose common shares are listed on the Toronto Stock Exchange discovered that for the first six months of its fiscal year it would report earnings greatly in excess of its earnings for the corresponding period in the preceding year and greatly in excess of what had generally been

186 Uniform Act Policy 2-12; OSC Policy 3-23.

anticipated. At the moment when this happy fact became clear, the issuer was in the process of settling a contract with a labour union that had struck one of its plants. The chief executive officer of the issuer telephoned a high ranking OSC staff member and explained that the company would prefer not to release the good news until after settling the labour contract. The call was consistent with the timely disclosure policy statements which advise that "if management has an unusual or difficult situation confronting it, it should discuss the matter promptly with the Commission".[187] The Commission official, who told the writer that he was troubled as to whether he had exercised his discretion properly, told the issuer's chief executive that under the circumstances it would be permissible for public announcement to await the filing of the issuer's six-month financial results in the normal course.[188]

Different people will have different answers to the question whether the desire on the part of an issuer's management to secure the labour of its unionized employees at the lowest price possible constitutes a valid business reason for non-disclosure under the securities laws of a favourable material change in the issuer's earnings. But it seems highly doubtful that if the question had to be confronted

187 Uniform Act Policy 2-12.

188 Interim unaudited financial statements on a six-month basis are required by s. 130 of the Act. The reporting obligation under Bill 7, s. 76 is quarterly.

publicly by rule rather than privately by telephone, the provincial government or the Securities Commission itself would declare an ongoing collective bargaining situation to be a valid business reason for non-disclosure of favourable developments relating to the issuer. If the regulator would not put itself on the line publicly, it is doubtful that it should do so privately.

Recently, acting again by policy statement rather than by statute or rule, the Commission has promulgated a disclosure code to be observed by issuers seeking to repurchase their shares in what have come to be known as "going private" transactions.[189] In December 1977, the Commission made its policy statement applicable specifically to corporate reorganizations intended to have the effect of compelling any shareholder to terminate his interest in the issuer, and in July 1978 it amplified the requirements for shareholder approval in such cases. Meanwhile the new controlling shareholder of a publicly-held Canadian issuer wished to buy out the minority interest in a transaction that would amount to a squeeze-out.

189 OSC Policy Statement 3-37, "Issuer Bids", [1977] OSC Bulletin 253, as amended by Weekly Summaries, November 4, 1977, p. 1; December 2, 1977, p. 1; July 14, 1978, pp. 12A-15A; October 20, 1978, Supplement "C". The "going-private" phenomenon is in part the result of changes in the federal and Ontario corporations statutes that for the first time made it permissible for corporations to buy their own shares. See The Business Corporations Act, R.S.O. 1970, c. 53, s. 39 as amended by The Business Corporations Amendment Act, 1972, c. 138, s. 13; Canada Business Corporations Act, S.C. 1974-75, c. 33, s. 32.

Counsel for the majority shareholder met privately with high level Commission personnel to persuade them of counsel's view that because of the manner in which the "going private" transaction was to be structured, the policy statement was not applicable. Counsel was successful. Once again, counsel's oral approach to the Commission was invited by the relevant policy statement which stated that in light of the novelty of the issues raised, "the parties concerned may meet with the Commission to request that any such criteria that are not relevant in their particular case be appropriately modified".[190] Again, orally granted exemptions raise disturbing "secret law" problems if the considerations in the grant of such exemptions are known only to a handful of lawyers who build up a substantial body of practical experience in the area. To the Commission's credit, however, in the "going private" area is the fact that the grounds upon which at least some of the exemptions have been made have been summarized in a published memorandum of the Director.[191]

The American Securities and Exchange Commission's practice of no-action letters seems distinctly preferable to the Ontario oral tradition. In the SEC system, when a securities issuer or a securities industry registrant is uncertain as to the application of a provision of the federal securities laws to activities that it

190 OSC Weekly Summary, July 14, 1978, p. 10A.

191 OSC Weekly Summary, October 20, 1978, Supplement "C".

proposes to undertake, it will have its counsel write to the Commission staff inquiring as to whether, in the staff's view, the activity may lawfully be undertaken without compliance with the provision in question. A no-action letter is a favourable response from a Commission staff member that recapitulates the facts as stated in the applicant's letter, discusses salient considerations in the relevant area of law and concludes by saying that, on the basis of the facts as stated, the staff would not recommend to the Commission that enforcement action should be taken if the applicant's proposed course of action were carried out without compliance with the particular provision or provisions.[192] All requests for no-action letters and the responses thereto, favourable or otherwise, are made available by the SEC for public inspection.[193] They are listed from time to time by subject matter and copies may be purchased from the Commission. The more significant ones are published in the SEC Docket, a weekly publication. The public availability of no-action letters vitiates the secret law problem.

192 See generally, W.G. Lockhart, "SEC No-Action Letters: Informal Advice as a Discretionary Administrative Clearance" (1972), 37 Law & Contemp. Probs. 95.

193 17 C.F.R. 200.81 (1978), adopted by Securities Act Release No. 5098 (Oct. 29, 1970), reprinted in [1970-71] CCH Fed. Sec. L. Rep. para. 77,921. The applicant may ask for confidential treatment for a period not to exceed 90 days. Making no-action letters publicly available is probably mandatory under the U.S. Freedom of Information Act since they amount to "statements of policy and interpretations ... adopted by the agency". See 5 U.S.C. s. 552(a)(2)(B) and text following note 218 infra.

In theory there is no such thing as a no-action letter in Ontario securities regulation. In fact, orders under the various exemptive provisions in the Act -- most notably orders under section 59 exempting distributions from the prospectus requirement -- are the functional equivalent of no-action letters. In addition to these formal orders, published in the Weekly Summary and occasionally in the Monthly Bulletin, there are in fact private oral no-action letters. These are available to those well enough versed in the operations of the Commission to ask for them and well enough connected to have access to the top ranking officials.

## G. Responsibility of the OSC to Cabinet and Legislature

It is sometimes suggested that freedom of information legislation would be inconsistent with the Anglo-Canadian scheme of responsible government and parliamentary supremacy. While it is not apparent to the writer just why that should be so, the debate can be left to others better versed in political science. If it is suggested, however, that sufficient public accountability by governmental agencies is secured by their accountability to the Cabinet which is in turn accountable to the Legislature which can be voted out of office, then it is relevant for this paper to consider briefly the nature and extent of political accountability of the Ontario Securities Commission.

The Commission clearly is not a regulatory agency "independent" of the government in a structural sense. It is organized as part of the Ministry of Consumer and Commercial Relations. In the legislative process the Commission formulates a position subject to at least general policy guidelines from the Minister.[194] Furthermore, the operations of the OSC are subject to review by the Legislature, if it cared to make such review, in the annual budgetary process for the Ministry.

In fact, however, as the present Chairman of the OSC wrote before he assumed that position,[195] there is precious little accountability by the Commission to the Cabinet or to the Legislature. A variety of factors contribute to this state of affairs. Since many of the Commission's functions are quasi-judicial in character, Cabinet recognizes the importance of non-interference in order to maintain the appearance and reality of impartiality on the part of the Commission in carrying out those functions.[196] Of equal importance

194 See Supp. "X" to OSC Weekly Summary for week ending April 7, 1978.

195 J.C. Baillie, "Securities Regulation in the 'Seventies", in Studies in Canadian Company Law, supra note 23, at 353.

196 In his book, Canadian Securities Regulation, supra note 51, Dean Johnston recounts the following occasion when the Minister of Financial and Commercial affairs was called upon to explain in the Legislature the nature of the Commission's accountability through him. The Minister was responding to criticisms of the Commission arising out of its issuance of a receipt for a prospectus for sale of debentures of the

(cont'd)

is the fact that outside the Commission itself there is a dearth of people in the government sufficiently familiar with the securities field to keep tabs on what the Commission is doing. This lack of relevant expertise extends to the Legislature. The ironic result, as has been pointed out elsewhere,[197] is that the OSC in a system of "responsible government" is a good deal less politically accountable in practice than is the Securities and Exchange Commission, an

196 (cont'd) Prudential Finance Corp. Prudential collapsed shortly after the distribution of the debentures was made. Certain quasi-criminal prosecutions brought under the Securities Act against some of the parties failed because the consent to prosecute had been improperly signed. In responding to critics the Minister said:

> The philosophy underlying the securities legislation aimed at freeing the Ontario Securities Commission from political interference or from intervention of political persons is well known. It must be a free and independent body with respect to its day-to-day operations. The Commission and its staff collectively represent many years' experience in every branch of the securites field. I submit that the Minister is entitled to rely on the legal opinions presented to him with the endorsement of the Chairman of the Commission involved, not only the recommendations as to the charges which ought to be laid, but also as to the procedures to be followed as conditions precedent to the laying of those charges.
>
> It seems strange to me that those who most strenuously urge that the Commission should operate without political interference, as the facts I have presented so clearly demonstrated it did in the present case, should now attack the Minister involved.

Canadian Securities Regulation, at 75, quoting Ont. Debates, 28th Leg., 2nd. Sess., 1969, p. 6405.

197 Baillie, supra, note 195.

"independent" regulatory agency in the United States. While the SEC structurally is outside both the executive and the legislative branches, it is in fact responsible to Congress through the budgetary process. Congressional committees are heavily staffed with bright, ambitious and typically young lawyers who have their own careers to make and who make them by keeping committee members well-briefed with the type and quality of information that will enable them to maintain an effective oversight of the agencies within a particular committee's jurisdiction. In other words, there is a balance of expertise between agency and legislature in the American system that is totally lacking in the Canadian.

In the recent enactment of the Securities Act, 1978, the Legislative Assembly was almost superfluous. The legislation was entirely the product of the OSC in consultation with industry representatives. The version passed, Bill 7, was in fact the sixth proposed new Securities Act to be introduced since 1972, but it was the only one to get beyond first reading.[198] With the introduction of each succeeding bill, voluminous briefs were filed and many meetings were held with interested parties. As a result of such meetings, for

198 The Bills, in order of introduction, were: Bill 154, 28th Leg., 4th Sess. (June 1, 1972); Bill 75, 29th Leg., 4th Sess. (June 7, 1974); Bill 98, 29th Leg., 5th Sess. (May 30, 1975); Bill 20, 30th Leg., 4th Sess. (April 5, 1977); Bill 30, 31st Leg., 1st Sess. (June 29, 1977); Bill 7, 31st Leg., 2d Sess. (Feb. 28, 1978).

example, numerous amendments were made to Bill 7 between first and second readings.[199] The Bill was referred to the Standing Committee on the Administration of Justice in late April 1978, and that Committee conducted a total of about ten days of hearings. It reported the Bill out on June 21 and third reading was given on June 23. Transcripts of the Committee hearings are kept on tape, but they are not transcribed or published. The Committee hearings were open to the public, but, since no advance agenda of topics was published, it would have been impossible for an interested member of the public to make an appearance on a given topic unless he was willing to sit through all ten days of hearings. The Committee issued no report on the Bill. The Bill was debated in the full Assembly only at second reading and then only in the most general terms.[200]

The Bill was amended in numerous and in some cases important respects in the Standing Committee,[201] but not one change of those

199 See Supplement "X" to OSC Weekly Summary, April 7, 1978. Probably the most important of the amendments involved substantial tightening of the private transactions exemptions to the take-over bid requirements so as to eliminate the control premium in these situations.

200 Ont. Debates, 31st Leg., 2nd Sess., April 6, 1978, pp. 1287-95.

201 Probably the most important changes to the bill at this stage were the elimination of "tippee" liability for insider trading and shortening the limitations period for most causes of action available to investors. Other changes included broadening the exemption from the definition of security in favour of certain (cont'd)

adopted was proposed from within the Committee.[202] The Bill was from the first word to the last exclusively the work of the Securities Commission and the industry. No input into the legislation was made by the Legislature. The Legislature's role was merely a necessary formality: to vote.

Although the history of Bill 7 would seem to suggest that the Commission's responsibility to the Legislature is not much, at the same time there were ample opportunities given to members of the public to make submissions to the Commission at various stages in the drafting of the Bill and the amendments to it. It is just that the legislative process was conducted at the OSC's offices and not at Queen's Park.

201 (cont'd) trust company-managed pooled accounts, broadening slightly the exemptions from the take-over bid rules, broadening the class of transactions in which chartered banks would not be deemed to be underwriters, and reducing the obligations on securities industry licensees to make insider trading reports on behalf of beneficial owners of securities held in the licensees' names.

202 The Vice-Chairman of the Committee, Mr. Renwick (NDP-Riverdale), proposed a change to the definition of "material change" in the bill, but the proposal was defeated by the Committee.

# CHAPTER III

## THE U.S. FREEDOM OF INFORMATION ACT AND THE OPERATIONS OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission administers a regulatory scheme that is more complex than that overseen by the Ontario Securities Commission; moreover, the size of the American agency and the volume of its work are greater than the Canadian by geometric proportions. Nonetheless, in basic outline securities regulation is sufficiently similar as between the two jurisdictions so that for present purposes there is no need to describe the work of the SEC separately. In fact, generally the acronym "SEC" could be substituted for "OSC" in Part I of this paper describing the work of the commission, without misleading the reader. Where SEC practice departs in relevant respect from that of the OSC, notation is made in the pages that follow. Probably for our purposes the most important distinctions between SEC and OSC practice are the degree to which the American agency relies on injunctive actions in the courts as its main enforcement tool and the great volume of private damage litigation engendered under the American but not the Canadian securities laws.

## A. The Freedom of Information Act in Outline

The U.S. Freedom of Information Act ("FOIA") in its present form[203] was enacted in 1966[204] and substantially amended in 1974,[205] both in substance and in procedure, to provide more liberal disclosure. The 1966 Act was itself a legislative response to the perceived inadequacy of the first American federal disclosure statute, section 3 of the Administrative Procedure Act of 1947.[206] Section 3 of the APA had required agencies to publish all final opinions or orders in the adjudication of cases "except those required for good cause to be held confidential" and to make available "to persons properly and directly concerned" matters of official record "except information held confidential for good cause found". The section provided no remedy for the wrongful withholding of information. It came to be treated in the government "more as a withholding statute than a disclosure statute",[207] a not surprising result in light of the extreme vagueness of its operative language.

203 5 U.S.C. s. 552 (1977).

204 Pub. L. 89-487, 80 Stat. 250 (1966), as amended by Pub. L. 90-23, 81 Stat. 54 (1967).

205 Pub. L. 93-502, 88 Stat. 1561 (1974), as amended by Pub. L. 94-409, s. 5(b), 90 Stat. 1247 (1976).

206 June 11, 1946, ch. 324, s. 3, 60 Stat. 238.

207 Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973), citing S. Rep. No. 813, 89th Cong., 1st Sess., 5 (1965); H.R. Rep. No. 1497, 89th Cong., 2nd Sess., 5-6 (1966). See also, Note, 38 Geo. Wash. L. Rev. 150, 151-52 (1969).

Hallmarks of the 1966 legislation included provision for judicial review of agency withholding of information, specification of nine fairly narrow categories of exemption from compelled disclosure, which exemptions were exclusive, and deletion of the requirement that a person requesting information have an interest therein (apart from a desire to obtain it).

1. Disclosure by Publication

Under the present FOIA each "agency" is required to make information publicly available in one of three ways: some information must be published in the Federal Register;[208] other information must be made available for public inspection and copying;[209] and the residual category of records must be made "promptly available to any person ... upon any request for records which (a) reasonably describes such records and (b) is made in accordance with published rules stating the ... procedures to be followed".[210] The term "agency" is broadly defined to include "any executive department, military department, government corporation ... or other establishment in the executive branch of the government (including the Executive Office of

208 5 U.S.C. s. 552(a)(1).

209 5 U.S.C. s. 552(a)(2).

210 5 U.S.C. s. 552(a)(3).

the President), or independent regulatory agency". Excluded from the definition of "agency" are the Congress and the courts.[211]

The requirement of publication in the Federal Register applies most significantly to:

- statements of the general course and method by which the agency's functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
- rules of procedure; and
- substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency. [212]

Agency rules are published as well in the Code of Federal Regulations ("CFR"). The CFR is itself painstakingly indexed, with the result that agency rules in the U.S. federal system are much more readily accessible than in the Canadian federal or provincial systems.

The following classes of documents must be made available for public inspection and copying:

- final opinions, including concurring and dissenting opinions, made in the adjudication of cases;
- statements of policy and interpretations adopted by the agency but not published in the Federal Register;
- administrative staff manuals and instructions to staff that affect a member of the public. [213]

211 5 U.S.C. s. 552(e).

212 5 U.S.C. s. 552(a)(1)(B), (C), (D).

213 5 U.S.C. s. 552(a)(2)(A), (B), (C).

A multi-member agency such as the SEC must also make available for public inspection a record of the final votes of each member in every agency proceeding.[214]

In fact, the Securities and Exchange Commission publishes final opinions as well as statements of policy, called "releases" and numbered in sequence under the particular statute to which the release relates, in a weekly publication called the SEC Docket. The category "final opinions" can be broader than simply the formal agency opinions issued by the agency as such in adjudicatory proceedings. Indeed, materials which might otherwise appear to be exempt from disclosure under the FOIA exemption for "intra-agency memoranda" may be covered by the "final opinion" rule. For example, the U.S. Supreme Court has held that memoranda of the General Counsel of the National Labor Relations Board instructing an NLRB regional office not to file a formal complaint before the Board, where a private party charges an unfair labour practice, are final opinions made in the adjudication of cases because the instruction to the regional office disposes of the charge.[215] Contrariwise, an instruction to file a formal complaint is not a "final opinion" because the validity of the complaint will then have to be adjudged by the Board

214 5 U.S.C. s. 552(a)(5).

215 NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 155 (1975). A party believing himself to be the victim of an unfair labour practice has no way of having his charge adjudicated unless the General Counsel chooses to bring the matter before the Board by filing a formal complaint. Id. at 139.

itself.[216] Final opinions ipso facto cannot come within the exemption from disclosure for intra-agency memoranda.[217] Furthermore, where an agency issues a final order and in its reasons for so doing incorporates by reference an intra-agency memorandum, that memorandum loses its exempt status and becomes part of the final order.[218]

With respect to statements of policy, it is not easy to tell which must be published in the Federal Register and which must merely be made available for inspection and copying. Presumably, the more generalized the applicability of the policy statement, the more likely it is that it should be published in the Federal Register. SEC no-action letters are published in the Docket but not in the Federal Register. Those letters, announcing that the Commission staff would not recommend enforcement action if the requestor pursued a stated course of conduct without reference to the securities laws,[219] would appear to have some precedential value, although they are tailored carefully to the facts of the particular request. They would appear to be "interpretations adopted by the agency" even though technically they are interpretations by the staff and not by the agency itself.[220]

216 Id. at 159.

217 Id. at 148. The exemptions are explored more fully below.

218 American Mail Line Ltd. v. Gulick, 411 F. 2d 696 (D.C. Cir., 1969).

219 Supra text accompanying notes 192-93.

220 Compare Tax Analysts and Advocates v. IRS, 505 F. 2d 350 (D.C. Cir., 1974).

Determination of what is meant by the expression "administrative staff manuals and instructions to staff that affect a member of the public" has proven troublesome. The biggest question has turned out to be whether manuals for the investigation of law violations must be disclosed.

The Senate Report on the Freedom of Information Bill said that the modifier "administrative" was inserted in contradiction to "law enforcement" in order to protect "the traditional confidential nature of instructions to government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action".[221] The administrative law enforcement distinction was further explicated in an FOIA case where disclosure of certain portions of the Internal Revenue Service's audit manual was sought:

> [T]he intent ... was to bar disclosure of information which, if known to the public, would significantly impede the enforcement process ... Enforcement is adversely affected only when information is made available which allows persons simultaneously to violate the law and to avoid detection. Information which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure .... 222

221 S. Rep. No. 89-813, 89th Cong., 1st Sess., at 2 (1965).

222 Hawkes v. Internal Revenue Service, 467 F. 2d 787, 795 (6th Cir., 1972), affirmed after remand, 507 F. 2d 481 (1974). Accord: Stokes v. Brennan, 476 F. 2d 699 (5th Cir., 1973); see also Project: Government Information and the Rights of

(cont'd)

Thus, under the court's interpretation, the only manuals affecting a member of the public that do not have to be published are those whose publication would substantially aid violations of the law.

The SEC has made available for public inspection portions of the Broker-Dealer Inspection Manual and the entire Investment Advisers and Investment Company inspection manuals.[223]

Each agency is required to publish on a substantially current basis indices of all material required to be made available for public inspection and copying -- that is, final opinions and orders, statements of policy and manuals -- and the Act further provides that unless these classes of material are made available and indexed or unless a party has actual and timely notice of them, none of them may be "relied on, used or cited as precedent by an agency against a party".[224]

222 (cont'd) Citizens, 73 Mich. L. Rev. 971, 1036-37 (1975). The Hawkes case itself resulted in disclosure of material that came about as close to the line of "aiding violation" as can be imagined: parts of the IRS Manual listing criteria for determining excessive business expense deductions in connection with selecting income tax returns for audit.

223 S.J. Rosenfeld, "The FOIA and the SEC: the First Six Months", 4 Sec. Reg. L. J. 3, 4 (1976).

224 5 U.S.C. s. 552(a)(2).

## 2. Disclosure Upon Request

Paragraph (3) of subsection (a) of the FOIA is its heart and together with the exemptions (subsection (b)) is the provision giving rise to the vast majority of the many hundreds of litigated cases. It states:

> Except with respect to records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

The FOIA generally requires an agency to disclose such records as it has; it does not require the agency to prepare records beyond whatever requirements in this regard are imposed by the particular agency's law.[225] The question of whether a particular request "reasonably describes" the records requested has given rise to surprisingly little litigation. It has been held that where an agency itself publishes a statement in which it makes reference to broad categories of documents, then an FOIA request parrotting the agency's own statement gives a reasonable description since the agency must know what documents it has referred to.[226] It has been

225 N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 161-62 (1975).

226 Bristol-Myers Co. v. FTC, 424 F. 2d 935 (D.C. Cir.), cert. denied. 400 U.S. 824 (1970); National Cable Television Ass'n. v. FCC, 479 F. 2d 183 (D.C. Cir., 1973). Before the 1974 amendments the request had to be for "identifiable" records but the change in language to a request that "reasonably describes" the records was not intended to change the standard of identifiability. Project, supra note 222, 73 Mich. L. Rev. at 1043.

recognized that in fact the scheme of the Act in this regard is to establish a balance between requestor and agency in the obligation to identify particular documents as responding to the request.[227] A request does not fail reasonably to describe records simply because it is broad or because it calls for a huge volume of documents.[228]

Since agencies can recover their search costs from requestors, they should not object even to requests calling for voluminous disclosure, at least so long as the manpower required for the search does not impede the agency from carrying out its normal responsibilities.[229] The key concept appears to be that the agency must make a "reasonable effort" to produce the documents requested.[230] The SEC has published detailed rules of procedure governing the processing of FOIA requests.[231] Generally requests for unpublished records

227 National Cable Television Ass'n. v. FCC, supra note 226.

228 Sears v. Gottschalk, 502 F. 2d 122 (4th Cir., 1974), cert. denied, 422 U.S. 1056 (1975) (request to U.S. Patent Office for "all abandoned patent applications" not overbroad or over-vague). But see Irons v. Schuyler, 465 F. 2d 608 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972) (request for "all unpublished manuscript decisions of the Patent Office" is not a request for identifiable records where compliance would involve a search of 4.7 million files going back over a century).

229 "If otherwise locatable, the rule ... is that equitable considerations of the costs, in time and money, of making records available for examination do not supply an excuse for non-production." Sears v. Gottschalk, supra note 228, 502 F. 2d at 126.

230 National Cable Television Ass'n. v. FCC, supra note 226, 479 F. 2d at 192.

231 17 CFR 200.80 (1978).

are to be made at the Commission's headquarters office in Washington, D.C., in person, by mail or by telephone during the Commission's normal business hours. In addition, the Commission maintains a Public Reference Room where documents in a category routinely made available to the public may be inspected and copied; many of these documents are also available at the Commission's regional and branch offices located throughout the country. The fee schedule set out in the regulations includes copying charges and records search-time charges.[232] The search-time charges would not cover all of the Commission's <u>FOIA</u> related expenses, however, since no charges are made for the time of Commission attorneys in determining whether documents requested are in fact exempt from disclosure under the <u>Act</u> or for the time occupied in agency appeals from the denial of requests or in litigation. "Screening" charges were made by numerous agencies before the 1974 amendments -- upon occasion running into many thousands of dollars for a single request. The amendments expressly limited the agencies to charging for "document search and duplication" and only the "direct costs" thereof.[233]

Disclosure under paragraph (3), as under the <u>Act</u> generally, is to be made to "any person". This wording has been held consistently to

232 17 CFR 200.80(e). The search charge itself -- $2.50 per half hour -- would not even cover the direct salary costs to the Commission of a clerk earning more than $10,000 per year.

233 5 U.S.C. s. 552(a)(4)(A). See generally, <u>Project</u>, <u>supra</u> note 222, 73 Mich. L. Rev. at 1104-12.

exclude consideration of the individual need or "interest", or the lack thereof, of the particular requestor for the records.[234]

The 1974 amendments to the FOIA established very strict time limits within which an agency must respond to disclosure requests.[235] This matter of procedure is of great practical moment since justice delayed may indeed at times be equivalent to justice denied. Under the 1966 Act there were no time limits specified, and Congress felt it necessary to remedy this situation in 1974.[236] Basically, an agency has ten days within which to determine whether or not to comply with a request. It may by notice to the requestor give itself one ten-day extension in specified "unusual circumstances", viz., where it needs to search for "a voluminous amount of separate and distinct records demanded in a single request", or to search offices geographically separate from the one processing the request, or where the agency must consult with another agency "having a substantial interest in the determination of a request or among two or more components of the agency having substantial subject matter interest therein".[237]

234 Environmental Protection Agency v. Mink, 410 U.S. 73, 86 (1973); see also Project, supra note 222, 73 Mich. L. Rev. at 1041 and cases therein cited. But see infra note 319 and accompanying text.

235 5 U.S.C. s. 552(a)(6).

236 See generally Project, supra note 222, 73 Mich. L. Rev. at 1113-16.

237 5 U.S.C. s. 552(a)(6)(B).

Where the agency determines not to comply with a request, it must notify the requestor of his right to appeal to the head of the agency. An appeal, if taken, must be determined within 20 days of filing. In the case of the SEC, the initial determination will be made by the "Freedom of Information Act Officer" or by a director of a staff division, and an appeal lies to the Commission itself.[238] The mechanism by which these time limits are enforced is simple. For purposes of judicial review of a refusal to disclose, the requestor shall be deemed to have exhausted his administrative remedies once the time limits have expired.[239]

### 3. Judicial Review

Perhaps the keystone in the structure of FOIA is the provision for judicial review. On complaint of the requestor, a federal district court has jurisdiction to enjoin an agency from withholding records and to order the production of any agency records improperly withheld from the complainant.[240] In such a case, the court is to make its

238 17 CFR 200.80(d)(5), (6).

239 The court may itself, however, grant the agency a further extension of time if "exceptional circumstances exist and ... the agency is exercising due diligence in responding to the request." 5 U.S.C. s. 552(a)(6)(C).

240 5 U.S.C. s. 552(a)(4)(B). The venue provision is broad. Venue lies "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia". *Id.*

determination de novo, the burden of proof that withheld documents come within one of the Act's exemptions is upon the agency, and the court may examine in camera the withheld documents in order to assess the availability of an exemption. An FOIA complaint is to be expedited on the court's calendar. Additional evidence of the importance that Congress attaches to FOIA actions, if any were needed, is found in the provision that the court may award attorneys' fees against the United States "reasonably incurred in any case under this section in which the complainant has substantially prevailed".[241] The common law rule in the United States, which has been reversed in a relatively few federal statutes, is that each party bears his own attorneys' fees, win or lose.[242] The FOIA provision allowing imposition of attorneys' fees is a one-way street: against, but not in favour of, the government.

In any serious system to promote freedom of information, the ultimate decision as to whether disclosure is to be made must be committed, if not to a traditional court, then at least to a neutral agency that is not a political arm of the government with a built-in bias against disclosure. The burden that FOIA litigation imposes on the courts, however, is substantial. This is especially the case since in most

241 5 U.S.C. s. 552(a)(4)(E). In one case involving the SEC, Bureau of National Affairs v. SEC (unreported) the district court awarded attorneys' fees to a successful plaintiff.

242 See Project, supra note 222, 73 Mich. L. Rev. at 1132 n. 1017.

situations a court will feel compelled to make in camera examination of the documents at issue in order to determine the validity or not of the agency's claim of exemption. Even before the 1974 FOIA amendments specifically providing for in camera examination, courts reviewimg freedom of information requests had determined that this was generally the appropriate procedure.[243] In camera examination obviously is burdensome in direct proportion to the volume of requested documents withheld by the agency. In camera examimation lacks the sharp adversariness that characterizes court proceedings generally and that sets the tone within which judges are accustomed to exercise their powers.[244] Occasionally judges in the United States have called upon counsel to make explications in chambers in the context of the in camera examination of documents,[245] but that raises serious problems of procedural fairness if only counsel for the resisting agency is present. If counsel for the complainant is present as well then a protective order will have to issue to prevent communications between that counsel and his own client -- a distasteful business. In camera inspection is not mandatory under the FOIA, however,[246] and courts have recognized that other

243 Environmental Protection Agency v. Mink, 410 U.S. 73, 89-94 (1973); Vaughn v. Rosen, 484 F. 2d 820 (D.C. Cir., 1973), cert. denied, 415 U.S. 977 (1974).

244 Vaughn v. Rosen, supra, 484 F. 2d at 825.

245 Project, supra note 222, 73 Mich. L. Rev. at 1126.

246 "[T]he court may examine the contents of such agency records in camera." 5 U.S.C. s. 552(a)(4)(B) (emphasis added).

procedures may be appropriate in some cases to determine the validity of a claim of exemption. Oral testimony or detailed affidavits from the agency may make the availability of a particular exemption clear.[247] In cases involving particularly voluminous documents it has been held to be within the discretion of the trial court to appoint a special master to examine documents and evaluate an agency's contention of exemption.[248]

Of greatest practical impact, perhaps, is a requirement imposed by the Court of Appeals for the District of Columbia Circuit, which has been followed elsewhere, that in FOIA litigation the agency must make a detailed index of the subject documents and must correlate its justification for claims of exemption to the specific parts of specific documents as indexed.[249] Highly generalized claims of exemption are not acceptable and, since the agency has the documents and the complainant does not, it seems fully reasonable for the courts to place the burden of discrimination among different documents and different claims upon the agency -- just as the Congress has placed upon the agency the burden of proving the availability of an exemption.[250] In the opinion in which it created

247 Environmental Protection Agency v. Mink, 410 U.S. 73, 93 (1973).

248 Vaughn v. Rosen, supra note 243, 484 F. 2d at 828.

249 Id. at 827.

250 5 U.S.C. s. 522(a)(4)(B).

the requirement of what has come to be known as the "Vaughn Index", the Court of Appeals made the following observations concerning the manner in which the government is encouraged to withhold documents from a requestor whenever possible.

> First, there are no inherent incentives that would affirmatively spur government agencies to disclose information. Under current procedures government agencies lose very little by refusing to disclose documents. At most they will be put to a court test stacked in their favor, the burden of which can be easily shifted to another by simply averring that the information falls under one of several unfortunately imprecise exemptions. Conversely, there is little to be gained by making the disclosure. Indeed, from a bureaucratic standpoint, a general policy of revelation could cause positive harm, since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure.
>
> Secondly, since the burden of determining the justifiability of a government claim of exemption currently falls on the court system there is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information. Let the court decide! ... If the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt. 251

After the Vaughn decision, Congress did legislate in the 1974 FOIA amendments certain incentives toward disclosure. One of these incentives is the attorneys' fees provisions discussed above and another is a provision to the effect that where a court orders records to be produced and assesses attorneys' fees against the government, it may issue a finding that agency personnel acted

251 Vaughn v. Rosen, supra note 243, 484 F. 2d at 826.

arbitrarily and capriciously in withholding the documents. On such a finding the Civil Service Commission must initiate a proceeding to determine whether disciplinary action is warranted.[252] This provision would seem, however, to be more flashy than useful since it would be indeed a rare court that would relish the thought of bringing disciplinary proceedings down upon a bureaucrat's head.

It was foreseen by the _Vaughn_ court that the requirement of elaborate indexing of withheld material would encourage agencies to release the maximum amount.[253] The courts had already held that non-exempt _portions_ of documents had to be released even where certain portions were exempt.[254] If, for example, portions of a document were exempt as intra-agency advice, then the portions of such a document that contained purely factual material would have to be released.[255] It was obviously preferable for the courts to put as much as possible of this burden of "redaction", as the segregation of non-exempt portions came to be known, on the agencies. The _FOIA_ as amended in

252 5 U.S.C. s. 552(a)(4)(F).

253 _Vaughn v. Rosen_, _supra_ note 243, 484 F. 2d at 828.

254 _Environmental Protection Agency v. Mink_, 410 U.S. 73, 91 (1973); _Sterling Drug, Inc. v. FTC_, 450 F. 2d 698, 704 (D.C. Cir., 1971); _Soucie v. David_, 448 F. 2d 1067, 1077-78 (D.C. Cir., 1971); _Ethyl Corp. v. Environmental Protection Agency_, 478 F. 2d 47 (4th Cir., 1973).

255 Unless the factual material were "inextricably intertwined" with the exempt material. _Montrose Chemical Corp. v. Train_, 491 F. 2d 63 (D.C. Cir., 1974).

1974 provides that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt ...".[256]

Where a court determines that records withheld do not in fact come within one of the exemptions, it has no choice but to order production of the records.[257] It has no residual equitable jurisdiction to decline to order production. This result appears to follow from the provision that "[t]his section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section",[258] and from the Supreme Court's statement in the Mink case that "these exemptions are explicitly made exclusive ... and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed".[259]

256 5 U.S.C. s. 552(b).

257 Tax Analysts and Advocates v. IRS, 505 F. 2d 350, 355 (D.C. Cir., 1974); Soucie v. David, 448 F. 2d 1067, 1076-77 (D.C. Cir., 1971); Wellman Industries, Inc. v. NLRB, 490 F. 2d 427, 429 (4th Cir.), cert. denied, 419 U.S. 834 (1974); Robles v. Environmental Protection Agency, 484 F. 2d 843, 847 (4th Cir., 1973); Hawkes v. IRS, 467 F. 2d 787, 792 n. 6 (6th Cir., 1972); Tennessean Newspapers Inc. v. Federal Housing Administration, 464 F. 2d 657, 661-62 (6th Cir., 1972), contra; General Services Administration v. Benson, 415 F. 2d 878, 880 (9th Cir., 1969). See generally, Project, supra note 222, 73 Mich. L. Rev. at 1150-57.

258 5 U.S.C. s. 552(c).

259 410 U.S. at 79.

## B. The FOIA Exemptions

There are nine categories of records exempt from mandatory disclosure under the FOIA. The Act "does not apply" to records coming within one or more of these categories.[260] That is, such materials have neither to be published in the Federal Register, nor to be made available for inspection and copying, nor to be disclosed to any person upon request. It would seem that the agencies are free to disclose voluntarily material coming within most cf the exemptions, but probably they are prohibited from disclosing material in exemption category 3 (matters specifically exempted from disclosure by statute), 4 (trade secrets) or 6 (invasion of privacy). This matter is explored further below in connection with "reverse FOIA" suits.

Exemption categories 1, 2, 3, 8 and 9 are relatively straightforward and can be dealt with very briefly. The remaining exemptions, which happen also to be the ones of principal practical importance in the securities regulation context, call for a bit more explanation.

Exemption 1 is for matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in

260 5 U.S.C. s. 552(b) (introductory clause).

fact properly classified pursuant to such Executive order".[261] Clause (B) was added by the FOIA amendments of 1974, at which time there had recently been numerous clashes between Congress and the Executive over executive secrecy. The addition of clause (B) makes the exemption a good deal narrower than the corresponding one relating to discovery in the Canada Evidence Act.[262] Before the 1974 amendments, the U.S. Supreme Court had ruled that matters asserted by the Executive to come within exemption 1 were not to be subjected to in camera inspection;[263] this rule was reversed by the amendments, which permit in camera inspection of documents claimed to fall under any of the exemptions.[264] It is expected, however, that a court would be especially deferential to Executive assertions of the availability of exemption 1, at least so long as the court could be satisfied that a particular classification decision was properly made from a procedural point of view.

Exemption 2 is for material "related solely to the internal personnel rules and practices of an agency".[265] Obviously the

261 5 U.S.C. s. 552(b)(1).

262 Supra note 138 and accompanying text.

263 Environmental Protection Agency v. Mink, 410 U.S. 73 (1973).

264 This is apparent from the language of 5 U.S.C. s. 552(a)(4)(B), supra note 246, as well as from the legislative history. See H.R. Rep. No. 93-1380, 93d Cong. 2d Sess. at 11 (1974) (Senate-House Conference Report).

265 5 U.S.C. s. 552(b)(2).

subject matter of this exemption, on the one hand, and "administrative staff manuals and instructions to staff that affect a member of the public", on the other, must be mutually exclusive categories since the latter must be disclosed under paragraph (a)(2) of the Act. The U.S. Supreme Court has held in Department of the Air Force v. Rose that the purpose of exemption 2 is to spare agencies the trouble of disclosing what would, from the point of view of any reasonably ascertainable public interest, be trivia.[266] Contrariwise, the "[e]xemption is not applicable to matters subject to ... a genuine and significant public interest".[267] In Rose, the court held that summaries of disciplinary proceedings at the U.S. Air Force Academy interpreting the Air Force Honor Code were matters involving a significant public interest due to the unique role of military officers in American society.

Exemption 3 is for matters "specifically exempted from disclosure by statute" other than the FOIA itself. Narrowing amendments were made

266 425 U.S. 352, 362-70 (1976).

267 Id. at 369. Exemption 2's legislative history, as appearing respectively in the Senate and the House Reports, is contradictory. The Senate Report, S. Rep. No. 89-813, 89th Cong., 1st Sess. at 8 (1965), clearly supports the construction of the exemption as one for trivia, citing as examples rules for employees' use of parking facilities and lunch hours. The House Report, H.R. Rep. No. 89-1497, 89th Cong., 2d Sess. at 10 (1966), gives a much broader sweep to the exception, including within its embrace, in particular, investigative manuals. In Rose, the Supreme Court held that the Senate Report was the more reliable interpretative guide, 425 U.S. at 367.

to this exemption in 1976[268] in order to reverse a decision of the U.S. Supreme Court that had held section 601 of the Federal Aviation Act to be such a statute.[269] That section provides that any person may make written objection to the Administrator regarding public disclosure of any information obtained by the Administrator, and "[w]henever such objection is made, the Administrator shall order such information withheld from public disclosure when, in [his] judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public".[270] The Supreme Court held that this was a statute specifically exempting material from disclosure, notwithstanding that it committed virtually total discretion to the Administrator.

In 1976 Congress, in order to overturn this decision,[271] added two alternative conditions to the exemption. The particular statute would have to "require that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or else it would have to establish "particular criteria for withholding or refer to particular types of matter to be withheld.[272] The "public

268 Pub. L. 94-409, s. 5(b), 90 Stat. 1247 (1976), as codified in 5 U.S.C. s. 552(b)(3).

269 FAA v. Robertson, 422 U.S. 255 (1975).

270 49 U.S.C. s. 1504.

271 H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976) (Conference Report).

272 Supra note 268.

interest" standard of section 601 of the Federal Aviation Act is not a particularized criterion. *Quaere* whether, for example, the standard for non-disclosure of material filed with the OSC established by section 137(2) of Bill 7 -- that the material "discloses intimate financial, personal or other information and the desirability of avoiding disclosure thereof in the interests of any person or company affected outweighs the desirability of adhering to the principle [of public disclosure]" -- would pass muster as an exempting statute under the U.S. FOIA? At least in section 137 the types of information are specified with some particularity, and so also is the basic issue to be weighed.

The SEC takes the position that one statutory provision that does meet the requirements of amended exemption 3 is s. 210(b) of the Investment Advisers' Act.[273] It provides that neither the SEC nor any member or employee thereof shall, apart from enforcement proceedings, "make public the fact that any examination or investigation under this title is being conducted, or the results of [it] ... or shall disclose [outside the Commission] any information obtained as a result of any such examination or investigation except with the approval of the Commission".[274] One difficulty would be whether the Commission's ability to consent to disclosures of

273 15 U.S.C. s. 80b-10(b).

274 Note how similar this language is to s. 24 of the Ontario Securities Act, *supra*, text following note 113.

information obtained in an investigation causes that clause to fail in the particularity required by exemption 3.

Exemption 8 is for matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions".[275] The term financial institutions is not defined in the FOIA. Primarily it would seem to refer to banks. Traditionally reports of banks' conditions have been kept secret on an argument that release of such information could cause runs on banks and economic de-stabilization. It has been doubted whether such arguments exhibit as much truth as drama.[276] In M.A. Schapiro & Co. v. SEC,[277] plaintiff sought disclosure under the FOIA of the Commission's staff study on off-board trading restrictions imposed by the New York Stock Exchange. The Commission resisted disclosure on the basis, inter alia, of exemption 8. The court held the exemption unavailable by looking to the definition of "financial institution" in section 17 of the Public Utility Holding Company Act.[278] It included banks, trust companies and investment banking

275 5 U.S.C. s. 552(b)(8).

276 See K.C. Davis, Administrative Law Treatise (2d ed.), v. 1, at 435 (1978).

277 339 F. Supp. 467 (D. D.C., 1972).

278 15 U.S.C. s. 79q(c). The section prohibits interlocking directorates between utility holding companies and financial institutions. In the litigation, resort to this section for a (cont'd)

firms but not securities exchanges or brokers or dealers in securities. It would seem then, if Schapiro is good law, that exemption 8 would not protect the reports of financial condition of brokers or dealers in the possession of the SEC, although other exemptions discussed below, such as those for confidential commercial information or for investigatory records, might well apply to exempt such records in a given situation.[279]

Exemption 9 is for "geological and geophysical information and data, including maps, concerning wells".[280]

## C. The Exemption for Trade Secrets

Exemption 4 is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential".[281]

278 (cont'd) definition of financial institution was apparently suggested by the Commission, 339 F. Supp. at 470, although it is hard to imagine why, since the Holding Company Act and the FOIA are hardly in pari materia.

279 Since some securities firms in the U.S. are publicly owned, unlike in Canada, substantial financial information as to such firms will be in the public domain anyway. The obligation of securities firms to file financial information with the Commission or with the appropriate self-regulatory organization is governed principally by s. 17(e) of the Securities Exchange Act of 1934, 15 U.S.C. s. 78q(e), and Rule 17a-5 thereunder, 17 CFR 240.17a-5 (1978).

280 5 U.S.C. s. 552(b)(9).

281 5 U.S.C. s. 552(b)(4).

This exemption -- along with the sixth, which seeks to protect personal privacy -- is of enormous practical importance since the basic thrust of the statute is that government is to "tell all", and yet government, because of its all-pervasive impact (not to say intrusion) upon business and private affairs, has become an immense depository of information about citizens, corporate and individual. It is at least arguable that what should be disclosed concerning citizens' (as opposed to government's) affairs should be regulated not by freedom of information legislation at all but by more specific legislation such as companies or securities statutes. As one commentator on the American FOIA has put it, "Government's duty to reveal its inner workings provides no similar justification for the disclosure of private parties' operations".[282] At the same time, in a highly regulated society the affairs of government and the affairs of private parties may well be one and the same, a fact illustrated in the freedom of information context by, for example, those cases where a party subject to a particular regulatory regime has sought disclosure from the regulator of the affairs of other regulated parties apparently to lay a basis for a claim of unjustified discrimination in the application of the regulation.[283] When,

282 J.T. O'Reilly, "Government Disclosure of Private Secrets under the Freedom of Information Act", 30 Bus. Law. 1125, 1134 (1975).

283 E.g., Sterling Drug, Inc. v. FTC, 450 F. 2d 698 (D.C. Cir., 1971); Grumman Aircraft Engineering Co. v. Renegotiation Board, 421 U.S. 168 (1975); Renegotiation Board v. Bannercraft Clothing Co. Inc., 415 U.S. 1 (1974).

therefore, a party seeks from the government information concerning the affairs of a competitor, it is not enough simply to conclude that this must be an abusive, unethical or legislatively unintended use of the freedom of information legislation.

The first subject matter of the exemption -- trade secrets -- has caused little interpretative difficulty in practice, so far at least as one can judge from reported cases, presumably because of its very well established common law lineage. An oft-cited American case has defined a trade secret as

> an unpatented, secret, commercially valuable plan, appliance, formula or process, which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities. [284]

While the FOIA exemptions themselves have been said by no less an authority than Professor Davis never to prohibit disclosure,[285] disclosure by the government of private parties' trade secrets would be prohibited by courts exercising a general equitable jurisdiction.[286]

The fourth exemption is no model of clear draftsmanship. It has consistently been interpreted, however, to protect two kinds of

284 U.S. ex rel. Norwegian Nitrogen Prods. Co. v. U.S. Tariff Comm'n., 6 F. 2d 491, 495 (D.C. Cir., 1925), rev'd. on other grounds, 274 U.S. 106 (1927).

285 Davis, supra note 276, at 328.

286 See generally J.W. Berryhill, "Trade Secret Litigation: Injunctions and other Equitable Remedies", 48 U. Col. L. Rev. 189 (1977).

information -- (1) trade secrets, and (2) information that exhibits the following three characteristics: (i) commercial or financial, (ii) obtained from a person, and (iii) privileged or confidential.[287] The reported cases treat exemption 4 as relating exclusively to business information, even though the literal wording and the legislative history would both suggest that personal financial information is included.[288] Confidential personal information, however, is the subject of the sixth exemption, and the type of personal financial information that the government most commonly possesses, income tax returns, also comes under exemption 3 as specifically exempted from disclosure by statute.[289]

To qualify under the fourth exemption, information must be obtained from a person. Person is defined to include partnerships and corporations, as well as individuals.[290] Information generated by

287 Consumers Union v. Veterans Administration, 301 F. Supp. 796, 802 (S.D.N.Y.), appeal dismissed, 436 F. 2d 1363 (2d Cir., 1971); Getman v. NLRB, 450 F. 2d 670, 673 (D.C. Cir., 1971).

288 See S. Rep. No. 89-813, 89th Cong., 1st Sess., 9 (1965); H.R. Rep. No. 89-1497, 89th Cong., 2d Sess., 10 (1966); see also Grumman Aircraft Engineering Co. v. Renegotiation Board, 425 F. 2d 578, 580 (D.C. Cir., 1970) (exemption "designed to prevent unwarranted invasions of personal privacy"); G.S.A. v. Benson, 415 F. 2d 878, 881 (9th Cir., 1969) (exemption is designed for information that a private individual wishes to keep confidential).

289 Internal Revenue Code of 1954, ss. 6103(a), 7213(a)(1).

290 5 U.S.C. s. 551(2).

the government itself concerning private parties does not qualify for the exemption. Thus the results of tests conducted by the Veterans Administration on hearing aids supplied to the Administration by the respective manufacturers were held not to come within the fourth exemption.[291]

The term privileged in the phrase "privileged or confidential" is probably redundant. Since privileges in the law of evidence are designed to foster certain confidential relationships regarded as socially beneficial, it is hard to imagine information of a non-confidential nature that is the subject of a privilege. The thorniest problem in exemption 4 has, not surprisingly, proven to be the meaning to be ascribed to the term "confidential". Early FOIA cases in the leading FOIA court, the U.S. Court of Appeals for the District of Columbia Circuit, indicated that the attribute of confidentiality was satisfied where either or both of the following requisites were met: the information was of a type that the provider customarily would not release to the public, or the government had promised confidentiality in soliciting the information.[292] The rules of the

291 Consumers Union v. Veterans Administration, supra note 287. See also, G.S.A. v. Benson, supra note 288, 415 F. 2d at 881; Fisher v. Renegotiation Board, 473 F. 2d 109 (D.C. Cir., 1972); Grumman v. Renegotiation Board, supra note 288, 425 F. 2d at 582.

292 Sterling Drug v. FTC, supra note 283, 450 F. 2d at 709; Grumman v. Renegotiation Board, supra note 288, 425 F. 2d at 582. The first requisite is a direct quote from the House Report on the Freedom of Information Bill. See H.R. Rep. No. 89-1497, supra note 288.

SEC implementing the FOIA incorporate this second test in reference to exemption 4. They speak of material "which is deemed to have been submitted to the Commission in confidence" and of information required to be filed "when the Commission has undertaken formally or informally to receive such submission or filing for its use or the use of specified persons only".[293] Later decisions have rejected these broad tests for satisfaction of the exemption. The first one, what the provider would itself make public, is totally subjective, and the second would allow the agencies in effect to expand the exemptions as they go along by offering to treat information as confidential. In National Parks and Conservation Ass'n v. Morton,[294] the D.C. Circuit narrowed the tests substantially. Only that information was to be regarded as confidential disclosure of which would be likely to either (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom it was obtained.[295] It was strongly suggested that the first ground could not be established where the information was obtained under statutory

293 17 CFR 240.80(b)(4).

294 498 F. 2d 765 (1974).

295 498 F. 2d at 770. See also, Charles River Park "A", Inc. v. Dept. of Housing and Urban Development, 519 F. 2d 935, 940 (D.C. Cir., 1975); Accord: Continental Stock Transfer & Trust Co. v. SEC, [1977-78] CCH Fed. Sec. L. Rep. para. 96, 172 (2d Cir., 1977).

compulsion.[296] The wisdom of this view is questionable since it may be highly inconvenient for the government to have to compel the provision of all information that it statutorily may compel. Cooperation may be preferable to compulsion, even if the latter is available.

Thus far there has been sparse judicial guidance in reported FOIA decisions as to precisely what sorts of apprehension of competitive harm from the release of commercial information would bring exemption 4 into play.[297] Here in Canada there are a number of reported decisions that might be of some relevance. These have arisen in cases where corporations have sought exemptions from the provisions

296 498 F. 2d at 770. A similar view, with respect to the availability of a Crown privilege to withhold documents obtained from private parties in the regulatory process has been expressed in Canada by the Federal Court of Appeal, supra note 139.

297 But in National Parks and Conservation Ass'n. v. Morton, supra note 294, the court implied that such harm could not be made out where the providers of information (on profit margins) were all monopolists whose position as such was statutorily protected. 498 F. 2d at 770. In Pennzoil Co. v. FPC, 534 F. 2d 627, 629 (5th Cir., 1976), the court was concerned with the competitive harm that the publication of the results of test drilling for natural gas could produce where Pennzoil's competitors could use the information in bidding for unleased federal lands in the neighbourhoods where Pennzoil's tests had been successful. In Sears, Roebuck & Co. v. GSA, 553 F. 2d 1378, 1381-82 (D.C. Cir., 1977), cert. denied, 434 U.S. 826 (1978), Sears urged that public disclosure of its affirmative action employment reports to the Government would reveal its (otherwise unavailable) labor costs to its competitors as well as identifying "promotable" employees who might be induced to leave Sears and to go with a competitor.

of the Ontario Business Corporations Act[298] or of the Canada Corporations Act[299] which require companies publicly to disclose in their financial statements their amounts of sales or gross revenues.[300] The Ontario Act provides that the OSC may permit a company to omit the sales figures where the provision of such information "would be unduly detrimental to the interests of the corporation".[301] The federal statute provides, similarly, that a judge may make an exemptive order where disclosure "would be seriously and unfairly detrimental to the interests of the company".[302]

298 R.S.O. 1970, c. 53, s. 173(1), as amended by S.O. 1972, c. 1; S.O. 1972, c. 138; S.O. 1974, c. 26. The principal reported cases construing the exemption are In Re Maher Shoes Ltd. (No. 1) [1967] 2 O.R. 684 (H.C.J.); In Re Maher Shoes Ltd. (No. 2) [1971] 2 O.R. 267 (C.A.); In Re Niagara Wire Weaving Co. Ltd. (No. 1) [1971] 3 O.R. 633 (C.A.); In Re Niagara Wire Weaving Co. Ltd. (No. 2) [1972] 3 O.R. 129 (C.A.).

299 R.S.C. 1970 (1st Supp.) c. 10, s. 128. The principal reported cases construing the exemption are In the Matter of S.E. Ames & Co. Ltd., [1972] 3 O.R. 405 (C.A.); Re St. Lawrence Starch Co. Ltd., [1972] 1 O.R. 293 (C.A., single judge); Re Firth Brown Steels Ltd., [1972] 3 O.R. 66 (C.A., single judge); Re Armco Canada Ltd. (1976), 8 O.R. (2d) 741 (C.A.).

300 See generally D. Johnston, "Exemption From Sales Disclosure in Regular Financial Statements: Courts, Tribunals and Business Judgments" (1973), 23 U.T.L.J. 215; J.A. Kazanjian, Corporate Disclosure, Study No. 18 for the Royal Commission on Corporate Concentration (1977).

301 Ontario Business Corporations Act, s. 173(3).

302 Canada Corporations Act, s. 129.3. See also and compare, Canada Business Corporations Act, S.C. 1974-75, c. 33, ss. 149, 150. The section goes on to provide that in making his determination the judge shall have "due regard to the interest of the public in having disclosure of the information". The Act nowhere hints at what that interest is, and the courts in St. Lawrence Starch, Firth Brown Steels and Armco, all supra note 299, have made short shrift of it.

In decisions under both statutes,[303] courts have held that the required showing of detriment is made out where the applicant is a one-product company and its competitors are multi-product companies so that the applicant, without the exemption, would be revealing to its competitors very exact information concerning its profit margins on the product in which they compete without receiving any such information in return. This supposedly makes it possible for the competitors, whose profit margins on the particular product are concealed, to set a price just low enough to squeeze all the profits from the applicant. Canadian courts virtually always accept this line of argument completely uncritically and without any consideration of whether or not such "predatory pricing" would in fact be feasible in the market for the particular product.

## D. How Parties Can Prevent the Government from Disclosing Commercial Information Supplied by Them

Since persons and business organizations must frequently provide to the government information that they regard as highly sensitive, and since the *FOIA* exemptions do not of themselves prohibit disclosure, a question arises as to how information-providers may prevent the government from releasing such information publicly pursuant to an

303 *Niagara Wire Weaving* (No. 1), *supra* note 298; *St. Lawrence Starch*, *Firth Brown Steels*, *Armco* — all *supra* note 299.

FOIA request. The short answer is that very often they cannot do so effectively. Companies' fears of the breadth of disclosure by government agencies of information they provide to those agencies has been evidenced in the form of resistance to the agencies' investigatory subpoenas.[304] In two recent cases involving the SEC's investigations into the payment by American corporations of bribes to foreign government officials,[305] the courts enforced the Commission's subpoenas but ordered the Commission not to disclose any of the information obtained to anybody apart from other law enforcement agencies without first giving to the submitting companies notice of the intended disclosure. The courts reserved jurisdiction to rule upon any objections to such disclosure that might be made by the companies. The effect of these orders is to give the companies an opportunity, before FOIA disclosure is made, to assert in court that such disclosure would be unwarranted.

The SEC has promulgated a rule under which any person filing any document with the Commission may request confidential treatment for such document.[306] The only basis upon which such a request would be

304 SEC v. Lockheed Aircraft Corp., 404 F. Supp. 651 (D.D.C., 1975); SEC v. The Boeing Company, [1976] CCH Fed. Sec. L. Rep. para. 95, 442 (D.D.C, 1976); FTC v. Texaco Inc., 555 F. 2d 862, 883-84 (D.C. Cir., 1977); Superior Oil Co. v. Federal Energy Regulatory Commission, 563 F. 2d 191, 203-05 (5th Cir., 1977).

305 SEC v. Lockheed; SEC v. Boeing, both supra note 304.

306 17 C.F.R. 240.24b-2.

honoured, however, is the availability of an FOIA exemption for the document. The chief benefit of the procedure for the supplier of information is that he will be notified where an initial decision is made not to honour the request for confidentiality or to revoke confidential status once conferred. The supplier can then appeal the initial determination to the full Commission, and if he is unsatisfied there he may presumably seek review in a United States Court of Appeals under section 25 of the Securities Exchange Act of 1934 as "a person aggrieved by a final order of the Commission".[307]

The most common way in which providers of information have sought to prevent the government from disclosing the information has become the "reverse FOIA" suit.[308] As its name would imply, in this type of lawsuit an information-submitter brings an injunctive action to compel the government agency to whom the information has been submitted to refrain from disclosing it. Virtually all of the reported actions to date have involved corporate plaintiffs seeking to prevent disclosure of information arguably subject to the fourth exemption. Unless a company wishes to litigate every time it provides

307 15 U.S.C. s. 78.

308 See generally, Clement, "The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit", 55 Tex. L. Rev. 587 (1977); Note, "Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection", 70 NW. U. L. Rev. 995 (1976); Note, "Protection from Government Disclosure -- The Reverse FOIA Suit", 1976 Duke L.J. 330.

a government agency with a scrap of paper, the reverse FOIA suit can be efficacious only when the plaintiff has advance notice that disclosure is about to be made. Yet, apart from some orders made in the subpoena enforcement context,[309] the writer is not aware of any obligation generally imposed upon agencies to advise parties that "their" information is about to be disclosed under the FOIA.

So far there has been great uncertainty in reverse FOIA lawsuits as to the precise basis upon which an injunctive cause of action in favour of information suppliers may be maintained and as to the source of federal courts' jurisdiction to hear such cases.[310]

Since most authorities are in agreement that the FOIA exemptions by themselves do not prohibit disclosure,[311] and since the FOIA does

309 E.g., cases cited supra note 304.

310 These problems are likely to be settled definitively -- and the discussion that follows in the text altered -- by a reverse FOIA case now awaiting decision in the U.S. Supreme Court; Chrysler Corp. v. Brown, No. 77-922, cert. granted March 6, 1978, 98 S. Ct. 1466.

311 Davis, supra note 276, at 328; Charles River Park "A" Inc. v. Dep't. of Housing and Urban Development, 519 F. 2d 935, 941 (D.C. Cir., 1975); Chrysler Corp. v. Schlesinger, 565 F. 2d 1172, 1185, (3d Cir., 1977), cert. granted sub nom. Chrysler Corp. v. Brown, 96 S. Ct. 1466; Pennzoil Co. v. F.P.C., 534 F. 2d 627 (5th Cir., 1976), Superior Oil Co. v. Federal Energy Regulatory Commission, 563 F. 2d 191, 204 (5th Cir., 1977). Contra: Westinghouse Electric Corp. v. Schlesinger, 542 F. 2d 1190, 1210 (4th Cir., 1976), cert. denied, 431 U.S. 924 (1977).

not explicitly confer any cause of action upon information suppliers, most courts have not been willing to find such a cause of action in the FOIA itself.[312] Generally, these courts have found the action to be maintainable under section 10 of the Administrative Procedure Act.[313] In addition, a provision of the U.S. Criminal Code, section 1905, makes it an offence for an employee of the United States to make known "in any manner or to any extent not authorized by law any information coming to him in the course of his employment ... which information concerns or relates to the trade secrets, processes, operations, style of work or apparatus, or to the identity, confidential statistical data, amount or source of income, profits, losses or expenditures of any person, partnership, corporation or association".[314] Some courts have found an implied private right of action to enforce this provision.[315]

312 But see Westinghouse v. Schlesinger, supra note 311.

313 Section 10(a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof", 5 U.S.C. s. 702, and s. 10(c) provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review", 5 U.S.C. s. 704.

314 18 U.S.C. s. 1905.

315 Charles River Park "A" Inc. v. HUD, supra note 311, 519 F. 2d at 942; Westinghouse Electric Corp. v. Schlesinger, supra note 311, 542 F. 2d at 1205-10. However, 18 U.S.C. s. 1905, may be too thin a reed upon which to hang a reverse FOIA cause of action (cont'd)

As for the jurisdictional basis for the reverse FOIA suit, many courts had turned once again to section 10 of the Administrative Procedure Act, but a recent decision of the U.S. Supreme Court (in a different context) has held that section 10 is not an independent grant of jurisdiction to the federal courts.[316] So far, the jurisdictional basis most generally accepted by courts in reverse FOIA suits has been 28 U.S.C. section 1331(a), which provides simply and with pregnant generality that: "The district courts have original jurisdiction of all civil actions wherein the matter in controversy ... arises under the Constitution, laws or treaties of the United States".[317]

315 (cont'd) because it prohibits disclosure only "to the extent not authorized by law". The federal government "housekeeping" statute, 5 U.S.C. s. 301, empowers the head of an executive department to "prescribe regulations for ... the custody, use and preservation of its records". Regulations adopted under s. 301 authorizing disclosure have been held to be lawful authorizations for the purposes of s. 1905. Chrysler Corp. v. Schlesinger, supra note 311, 565 F. 2d at 1186-88. Contra, Charles River Park "A" v. HUD, supra note 311, 519 F. 2d at 942.

A related question is whether s. 1905 is a statute specifically exempting information from disclosure for the purposes of exemption 3 of the FOIA. The courts are divided. Compare, e.g. Charles River Park "A" v. HUD, 519 F. 2d at 941 ("no"), with Westinghouse Electric Corp. v. Schlesinger, 542 F. 2d at 1199-1203 ("yes", discussing all the cases both ways).

316 Califano v. Sanders, 430 U.S. 99 (1977).

317 See cases cited supra note 311; Sears, Roebuck & Co. v. GSA, 553 F. 2d 1378 (D.C. Cir., 1977); Planning Research Corp. v. FPC, 555 F. 2d 970 (D.C. Cir., 1977).

E. The Exemption for Invasions of Privacy

FOIA exemption 6 is for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". The "clearly unwarranted invasion ..." standard has been held to modify the exemption for all three types of files.[318] As is clear from its wording, the exemption recognizes the privacy interests of natural persons only.

Exemption 6 is unique in the FOIA because in order for a court to determine whether the invasion of privacy resultant upon disclosure would be "clearly unwarranted", the interests of the particular requestor in disclosure must be weighed against the subject's interest in privacy. It would seem, however, that the requestor's interest is to be weighed only insofar as his interest encompasses what can fairly be called a "public interest" in disclosure and not just a private one.[319] Still, exemption 6 cuts against the overall

318 Dep't. of the Air Force v. Rose, 425 U.S. 352, 371 (1976).

319 In Rose, supra note 318, student editors of a law journal sought disclosure of summaries of disciplinary proceedings at the U.S. Air Force Academy, with names and other identifying details removed. The Supreme Court affirmed the holding of the Court of Appeals which had ordered the trial court to edit out identifying details prior to making disclosure of the requested material. Although the Supreme Court's opinion (at 381) left open the possibility that ultimately no disclosure would be made because identifying details could not be sufficiently removed, the court stated (at 378) that disclosure would not be inappropriate merely because there could be no guarantee that (cont'd)

thrust of the FOIA which, as has been seen, is to require disclosure to any person regardless of the nature of his interest, if any, in the information sought.[320]

If a personal record that qualifies under exemption 6 is also a "record" within the federal Privacy Act of 1974[321] then the agency that has custody of it may not disclose it. There is no discretion in the matter, as there is with most of the FOIA exemptions. Very generally, subject to numerous and important exceptions, the federal Privacy Act grants to individuals access to records concerning them maintained by agencies of the U.S. government, provides a mechanism whereby individuals can challenge inaccurate information in records

319 (cont'd) it would not trigger recollection of the identity of any of the disciplined cadets in any person whomsoever. See also: Getman v. NLRB, 450 F. 2d 670 (D.C. Cir., 1971) (court orders disclosure of names and addresses of persons entitled to vote in union certification proceedings to two distinguished labour law scholars seeking voluntary cooperation of eligible employees in a study of voting patterns); Wine Hobby U.S.A. v. Bureau of Alcohol, Tobacco and Firearms, 502 F. 2d 133 (3d Cir., 1974) (disclosure of names and addresses of persons registered to manufacture wine at home for family consumption to plaintiffs for private, commercial exploitation would constitute clearly unwarranted invasion of personal privacy); Committee on Masonic Homes v. NLRB, 556 F. 2d 214, 219 (3d Cir., 1977) (disclosure to employer of cards signed by employees authorizing a union to represent them for collective bargaining would constitute a serious invasion of personal privacy counter-balanced by no significant public interest).

320 Supra text accompanying note 234.

321 5 U.S.C. s. 552a. Pub. L. 93-579, s. 3, 88 Stat. 1897 (1974), as amended by Pub. L. 94-183, s. 2(2), 89 Stat. 1057 (1975).

concerning them, limits the disclosure that can be made by the agencies of such records, and requires the agencies to maintain an account of the disclosures they make of an individual's record and to grant the individual, upon his request, access to the account. Subsection (b) of the Act provides that "no agency shall disclose any record which is contained in a system of records ... except ... with the prior written consent of the individual to whom the record pertains, unless disclosure of the record would be ... (2) required under section 552 of this title [the FOIA]".[322] By definition, material that comes within an FOIA exemption, most importantly for present purposes exemption 6, is not required to be disclosed under section 552. Therefore the Privacy Act prohibits its disclosure, unless, of course, disclosure is permitted under one of the other clauses under subsection (b) of the Privacy Act.

The term "record" is broadly defined by the Privacy Act to mean "any item, collection, or grouping of information about an individual that is maintained by an agency ... and that contains his name, or the identifying number, symbol or other identifying particular assigned to the individual".[323] A "system of records" is a group of records under the control of any agency from which information is retrieved by the name of the individual or other identifying symbol".[324]

322 5 U.S.C. s. 552a(b).

323 5 U.S.C. s. 552a(a)(4).

324 5 U.S.C. s. 552a(a)(5).

## F. The Exemption for Internal Memoranda

Exemption 5 is for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency".[325] This exemption under the FOIA incorporates expressly the rules of discovery and exemptions from the obligation to make discovery; thus the case law of discovery becomes highly relevant. In particular, the exemption incorporates three privileges from the law relating to discovery. One of these, governmental or "executive" privilege, is exclusive to the government;[327] the other two, the attorney-client privilege and the attorney work-product or Hickman v. Taylor privilege, are available to the government in the same measure as to the private litigant.[328]

325 5 U.S.C. s. 552(b)(5).

326 NLRB v. Sears, Roebuck & Co., Inc., 421 U.S. 132, 149-54 (1975); EPA v. Mink, 410 U.S. 73, 86-91 (1973); International Paper Co. v. FPC, 438 F. 2d 1349, 1358 (2d Cir., 1971), cert. denied, 404 U.S. 827 (1971).

327 The phrase "governmental" privilege is preferable because the privilege is available not only to the Executive Branch but also to independent regulatory agencies such as the SEC. SEC v. National Student Marketing Corp., 538 F. 2d 404 (D.C. Cir.), cert. denied, 429 U.S. 1073 (1976).

328 Attorney-client privilege: Mead Data Center, Inc. v. Dep't of Air Force, 566 F. 2d 242, 252 (D.C. Cir., 1977); Detroit Screwmatic Co. v. U.S., 49 F.R.D. 77 (S.D.N.Y., 1970); NLRB v. Sears, Roebuck, supra note 326, 421 U.S. at 149 (dictum).

Attorney work product privilege: NLRB v. Sears, Roebuck, supra note 326, 421 U.S. at 160; U.S. v. Anderson, 34 F.R.D. 518 (D. Col., 1963); Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133, 138 (E.D. Wis., 1972); J.H. Rutter Rex

(cont'd)

There is, of course, an incongruity in the incorporation of discovery principles into the FOIA. In discovery, the relevance of the material sought to the issues in the litigation and therefore the need of the party seeking discovery for the information are of the essence; FOIA disclosure on the other hand is to be made to "any person" regardless of need. The attorney work-product rule, in particular, is only a qualified privilege. Where a party in litigation shows substantial need for attorney work-product documents and an inability without undue hardship to obtain their substantial equivalent by other means, production may be ordered, although the Court "shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of the party concerning the litigation".[329] Under FOIA exemption 5, however, the Supreme Court has held that a reviewing court is not to posit the position vis-a-vis discovery of the documents that would be enjoyed by the most needy hypothetical litigant.[330] The question

328 (cont'd) Mfg. Co. Inc. v. NLRB, 473 F. 2d 223, 234 (5th Cir.), cert. den. 414 U.S. 822 (1973); SEC v. Allegheny Beverage Corp., [1973] C.C.H. Fed. Sec. L. Rep. para. 94, 183 (D.D.C.); SEC v. Geotek, [1975] C.C.H. Fed. Sec. L. Rep. para. 95, 039 (N.D. Calif.).

It is clear that in the United States the attorney work product privilege, as recognized in the leading case of Hickman v. Taylor, 329 U.S. 495 (1947), is separate from the attorney-client privilege. This is not so clear in Canada. See authorities cited note 159 supra.

329 Fed. R. Civ. Pro. 26(b)(3).

330 NLRB v. Sears, Roebuck, supra note 326, 421 U.S. at 149 n. 16.

under exemption 5 is rather whether the document "would routinely be disclosed in private litigation".[331]

The American cases on governmental privilege are legion,[332] and judicial explications of the bases of the privilege are very similar to those to be found in the Canadian and English jurisprudence. The most frequently cited is the decision of the former U.S. Supreme Court Justice, Stanley Reed, sitting by designation in the Court of Claims in Kaiser Aluminum and Chemical Corp. v. U.S.[333] That was a breach of contract action in which Kaiser sought discovery of certain internal memoranda of the General Services Administration. The court affirmed the existence of a privilege against disclosure with these observations:

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

331 Id., quoting H.R. Rep. No. 1497, 89th Cong., 2nd Sess., 10 (1966).

332 And, indeed, sometimes famous: see U.S. v. Nixon, 418 U.S. 683 (1974), in which it was held that a trial court could lawfully compel President Nixon to turn over to it for in camera inspection certain tapes of conversations occurring in his office that had been subpoenaed by the Watergate Special Prosecutor in connection with the upcoming trial for various crimes of certain of the President's former associates.

333 157 F. Supp. 939 (1958).

> There is a public policy involved in this claim of privilege for this advisory opinion — the policy of open frank discussion between subordinate and chief concerning administrative action. [334]

The privilege protects not only advice from subordinates to decision-makers but also communications among decision-makers of equal rank, such as agency commissioners.[335] In the discovery context just as in the freedom of information context, documents over which governmental privilege is asserted normally are subject to *in camera* judicial inspection so that the appropriateness of the assertion of privilege can be verified, and the purely factual material contained in such documents is discoverable.[336] Classified foreign affairs and national defence material are not subject to *in camera* inspection for discovery purposes,[337] although apparently they are under the *FOIA*.[338]

It will be recalled that agencies are required by the *FOIA* to make publicly available "final opinions ... as well as orders, made in the

334 157 F. Supp. at 945-46. See generally Note, "Discovery of Government Documents and the Official Information Privilege", [1976] Colum. L. Rev. 142.

335 *Sterling Drug, Inc. v. FTC* 450 F. 2d 698, 708 (D.C. Cir., 1971).

336 *EPA v. Mink*, 410 U.S. 72, 87-88 and cases therein cited at nn. 14, 15 (1973).

337 *U.S. v. Nixon*, supra note 332, 418 U.S. at 706, 710-11. In this respect American and Canadian law appear to be the same, *supra*, text accompanying notes 136-38.

338 *Supra* text accompanying notes 263-64.

adjudication of cases", and that such final opinions and orders cannot qualify as exemption 5 material.[339] The purpose of the requirement is to impede the development of secret law. Consistent with this notion, in construing exemption 5 courts have drawn a distinction between pre-decisional memoranda and post-decisional ones, between memoranda which argue for the adoption of a particular policy in a given case and those that adopt it. This distinction, like so many others in the law, may be easier to state than to apply, but a number of courts have risen to the task of compelling agencies to publish what are in fact final opinions even though not denominated as such by the agencies. In Sterling Drug, Inc. v. FTC,[340] Sterling, which was being proceeded against by the Commission for having consummated an allegedly anti-competitive merger, sought memoranda prepared by Commission members and employees analyzing a different but, according to Sterling, completely analogous merger which the Commission had approved. The Court of Appeals ordered the trial court to make *in camera* inspection of the documents and to disclose to Sterling those, if any, "emanating from the Commission as a whole" explaining the grounds for approving the earlier merger. The staff memoranda and those prepared by individual commissioners were not to be disclosed unless, and only to the extent that, they were incorporated as the reasons for the Commission's action. In NLRB v.

339 *Supra* text accompanying notes 215-18.

340 *Supra* note 335.

Sears, Roebuck & Co., the Supreme Court ordered disclosure of memoranda prepared by the Board's General Counsel which disposed of certain unfair labour practice charges by instructing underlings that no formal complaint was to be filed.[341]

In construing exemption 5, the theory propounded in relation to discovery that "government cannot operate effectively in a fish bowl" has been imported into the FOIA pretty much lock, stock and barrel by the Congress[342] and the courts[343] -- including even that most disclosure-minded of all courts, the Court of Appeals for the District of Columbia Circuit.[344] Even for internal agency memoranda that cannot be said to constitute secret law, the writer finds a number of problems usually not acknowledged by the courts with the government-in-a-goldfish-bowl justification for exempting

341 Supra note 326; see also Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975); General Services Administration v. Benson, 415 F. 2d 878, 881 (9th Cir., 1969); Schwartz v. IRS, 511 F. 2d 1303, 1305-06 (D.C. Cir., 1975); see generally Davis, supra note 276, at 404-23.

342 S. Rep. No. 89-813, 89th Cong., 1st Sess. at 9 (1965); H.R. Rep. No. 89-1497, 89th Cong., 2d Sess. at 10 (1966).

343 NLRB v. Sears, Roebuck & Co. supra note 326; EPA v. Mink, supra note 336; Tennessean Newspapers, Inc. v. FHA, 464 F. 2d 657, 660 (6th Cir., 1972); International Paper Co. v. FPC 438 F. 2d 1349 (2d Cir., 1971).

344 Ackerly v. Ley, 420 F. 2d 1336, 1341 (1969); Sterling Drug, Inc. v. FTC, 450 F. 2d 698, 706-07 (1971); Montrose Chemical Corp. v. Train, 491 F. 2d 63, 66 (1974).

such materials from disclosure.[345] The theory conjures up a view of the civil servant as a pusillanimous, scrawny-willed clerk constitutionally incapable of expressing a viewpoint for fear that someone is looking over his or her shoulder, ready to pounce. The theory was propounded in a day when government's activities were far more limited than they are presently, and when, perhaps for that reason, government decision-making claimed a degree of public acceptance and immunity from scrutiny that would not be accorded today. The temper of our times is to be highly suspicious of government. And, assuming that the exchange of ideas between subordinate and superior would indeed be less candid and frank if one of them were conscious of a possible public accountability, would that necessarily be such a bad idea? Maybe government should operate in a fish bowl. Perhaps we might well exchange some candour for more care, precision, discrimination and discernment. Take, for example, the question whether disciplinary proceedings should be initiated against a licensee. It is submitted that an agency staff member's advice to his superiors might at once be more fair to the proposed respondent and more helpful to the decision-maker if the staff member had in the back of his mind the possibility that the respondent might at some point have access to the memorandum. Then the staff member

345 Much of what follows has been canvassed elsewhere. See, e.g., Colum. L. Rev. Note, *supra* note 334; J.M. Katz, "The Games Bureaucrats Play: Hide & Seek Under the Freedom of Information Act", 48 Tex. L. Rev. 1261 (1970); C.H. Koch, Jr., "The Freedom of Information Act: Suggestions for Making Information Available to the Public", 32 Maryland L. Rev. 189 (1972).

might limit himself to the facts that he thought ultimately could be proven and would likely eschew innuendo. This is not to argue for a wholesale abandonment of the traditional privilege for the government's deliberative materials, but only for a careful rethinking of the justifications therefor.

Perhaps a rule should evolve that internal deliberative memoranda should lose their exempt status and in effect enter the public domain after the matter to which they relate has been closed or after a certain period of time has elapsed since the writing of them. Such a rule would promote disclosure and yet would be relatively easy to administer. Admittedly very few people will request disclosure of material relating to closed, as opposed to current, issues; but surely the justification for preservation of government confidences is strongest during the currency of consideration of a particular issue. While an issue is being debated within an agency, the writer would protect broadly the agency's deliberative materials, if only to protect agency personnel from harrassment and from being distracted from their principal, substantive tasks.

G. The Exemption for Investigatory Records

Exemption 7, for investigatory records, was the one most sharply limited in the 1974 FOIA amendments.[346] As amended, the exemption is unavailable in most situations where at the time of the FOIA request the investigatory file to which the records relate is closed, either because law enforcement action had terminated or because no enforcement action is contemplated.[347] The legislative intent of the 1974 amendment to exemption 7 has been held by the Supreme Court to place upon the agency an obligation to demonstrate that disclosure of the particular investigatory file would contravene the purposes of the exemption.[348]

Exemption 7 now protects "investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would:

346 Unamended, the exemption was for "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency".

347 Before the amendment most of the cases had held "once an investigatory file, always an investigatory file". Weisberg v. Dep't. of Justice, 489 F. 2d 1195 (D.C. Cir., 1973), cert. denied, 416 U.S. 993 (1974); Frankel v. SEC, 460 F. 2d 813 (2d Cir.), cert. denied, 409 U.S. 889 (1972); Evans v. Dep't. of Transportation, 446 F. 2d 821, 824 (5th Cir., 1971); Aspin v. Dep't. of Defense, 491 F. 2d 24 (D.C. Cir., 1973). Contra: Bristol Myers Co. v. FTC, 424 F. 2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

348 NLRB v. Sears, Roebuck, supra note 326, 421 U.S. at 164; see also Title Guaranty Co. v. NLRB, 534 F. 2d 484 (2d Cir.), cert. denied, 429 U.S. 834 (1976).

(A) interfere with enforcement proceedings,

(B) deprive a person of a right to a fair trial or an impartial adjudication,

(C) constitute an unwarranted invasion of personal privacy,

(D) disclose the identity of a confidential source,

(E) disclose investigative techniques and procedures, or

(F) endanger the life or physical safety of law enforcement personnel."[349]

The term "law enforcement" is to be broadly construed; it includes both criminal and civil law enforcement activity.[350]

The six alternatively-stated conditions, at least one of which must be met in order that particular investigatory records should be exempt from FOIA disclosure, appear to be relatively straightforward and precise. As for condition (A), for example, where at the time of the FOIA request an enforcement action is either pending or seriously contemplated, one would expect courts to accept relatively automatically that there was a distinct danger of interference with the enforcement proceedings if FOIA disclosure were to be ordered. In other words, the only disclosure that would be compelled in the

349 5 U.S.C. s. 552(b)(7). The 1974 amendments also changed the generic designation from "investigatory files" to "investigatory records". Apparently records was regarded as a narrower designation than files.

350 Center for National Policy Review on Race and Urban Issues v. Weinberger, 502 F. 2d 370, 373 (D.C. Cir., 1974); Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F. 2d 945, 949 (4th Cir., 1974); H.R. Rep. No. 93-1380, 93d Cong., 2d Sess., 12-13 (1974); Project, supra note 222, at 1089.

context of pending or imminent enforcement activity would be disclosure to a party under the relevant rules for discovery in the particular type of proceeding.[351]

Exemption 7(C), covering a situation where disclosure of investigatory records "would constitute an unwarranted invasion of personal privacy", like exemption 6 (invasion of privacy), appears to call for a balancing between the need for disclosure of the requesting party and the invasion of privacy.[352] The exemption in 7(C) should be more readily available than exemption 6, however, since the former is available wherever there would be an "unwarranted" invasion of personal privacy; it does not require a "clearly unwarranted" invasion.

In Request of John A. Jenkins[353] the SEC attempted to fold a rather broad category of investigative records within exemption 7(C). The request was for all staff memoranda since January 1, 1974, upon the basis of which SEC investigations had been closed. The Commission decided to release closing memoranda on files where enforcement action had been taken and terminated, but not on files where no enforcement action had been brought. The Commission declared that

351 See *infra* text accompanying notes 356-72.

352 Davis, *supra* note 276, at 320-23.

353 SEC, FOIA Release No. 11 (June 11, 1975).

disclosure of the closing memoranda and underlying records in the latter category of cases would constitute an unwarranted invasion of personal privacy, at least where no special showing of need was advanced by the requestor. Mr. Jenkins, however, might well have been able to make a showing of "need". He is a reporter for the Bureau of National Affairs, publisher of the weekly Securities Regulation Law Report. The Report is read religiously by American securities law practitioners, who obviously have an intense interest in SEC enforcement policies as formed on a case-by-case basis. It might be argued that the closing memoranda where no enforcement action is taken are equivalent to the NLRB General Counsel's memoranda ordered disclosed in NLRB v. Sears, Roebuck & Co.[354] Furthermore, the Commission's statement in Jenkins that no invasion of privacy could result from disclosure of investigatory records where enforcement action has been brought, is simply not accurate.[355] The private affairs of totally innocent persons may well be revealed in the course of a securities commission investigation whether or not enforcement action is taken. Revelation of investigatory files will in very many cases compromise personal privacy interests. The question is: when is this warranted? As the writer is informed, when the SEC turns over investigatory records on a closed matter pursuant to an FOIA request, some effort is made to cleanse

354 Supra notes 215-216 and accompanying text.

355 Supra note 353.

transcripts of such personal information as addresses, telephone and social security numbers. But that is about all. A more discriminating editing-out is apparently administratively impossible. The result is that persons involved in an SEC investigation, however tangentially and not even necessarily as witnesses, do have something to fear in terms of invasion of personal privacy occurring via FOIA disclosures.

## H. The Interrelationship Between FOIA Requests and Discovery Rules

As a rule, the status of a person making an FOIA request as a party in civil or criminal litigation or administrative proceedings involving the agency to which the FOIA request is made has no effect one way or another upon FOIA entitlement. The FOIA mandates disclosure to "any person" irrespective of need for the information or interest in the subject matter. In NLRB v. Sears, Roebuck & Co., Mr. Justice White, speaking for seven Supreme Court justices said:

> Sears rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. 356

356 421 U.S. 132, 143 n. 10. Sears was prompted to seek FOIA disclosure in connection with an appeal that it was preparing to the Board's General Counsel from a refusal of a regional office to file a formal complaint on an unfair labor practice charge lodged by Sears. Ultimately Sears succeeded both in the appeal to the General Counsel and, to a large extent, in its FOIA suit.

The FOIA does not amount to an indirect amendment either of the discovery rules of the agencies for administrative proceedings[357] or of the discovery provisions of the Federal Rules of Criminal Procedure.[358] As for the U.S. federal civil discovery rules, they could not conceivably be broader than they are, anyway.[359] While an FOIA requestor's litigation involvement with an agency cannot increase his rights under the FOIA beyond what must be disclosed "to any person", neither should it disentitle him to the disclosure that under the FOIA must be made "to any person". In at least one reported criminal case a court appears to have lost sight of this fairly

357 Title Guarantee Co. v. NLRB, 534 F. 2d 484, 491-92 (2d Cir.), cert. denied, 421 U.S. 834 (1976); Roger J. Au & Son, Inc. v. NLRB, 538 F. 2d 80, 83 (3d Cir., 1976); Climax Molybdenum Co. v. NLRB, 539 F. 2d 63, 65 (10th Cir., 1976); New England Medical Center Hospital v. NLRB, 548 F. 2d 377, 384 (1st Cir., 1976). See also Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974).

358 Fruehauf Corp. v. Thornton, 507 F. 2d 1253 (6th Cir., 1974); U.S. v. Murdock, 548 F. 2d 599 (5th Cir., 1977). There is some discovery provided for in federal criminal cases in the United States, although it is nothing like as broad as the discovery available in civil actions. Under Rule 16(a)(1)(c), Fed. R. Crim. Pro., 18 U.S.C., upon request of the defendant "the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects ... which are within the possession, custody or control of the government, and which are material to the preparation of his defence or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant". A Defendant's access to witness statements is governed by the Jencks Act, 18 U.S.C. s. 3500, which provides that after the witness has testified on direct, upon motion of the defendant the court shall order the government to produce any prior witness statement "which relates to the subject matter as to which the witness has testified".

359 Fed. R. Civ. Pro., 28 U.S.C., Rules 26-37, esp. Rule 34.

obvious proposition and to have refused to entertain an FOIA claim simply because the requestor was a defendant in the criminal case.[360]

One would think that since FOIA exemption 6 -- that relating to "clearly unwarranted" invasions of personal privacy -- requires a balancing of the privacy interest against the individual requestor's interest in disclosure, the status of the requestor as a litigant would be a relevant factor in determination of the availability of the exemption. Such reasoning was rejected, however, in a recent case which held that the balancing required under exemption 6 was between the privacy interest and the public interest in disclosure, and that the just resolution of the administrative proceeding in connection with which the FOIA request had been made was not such a public interest.[361]

360 U.S. v. Murdock, 548 F. 2d 599, 602 (5th Cir., 1977). This case is sharply criticized by Prof. Davis, supra note 276, at 324.

361 Columbia Packing Co., Inc. v. U.S. Dep't. of Agriculture, 563 F. 2d 495 (1st Cir., 1977). Columbia had been convicted of bribing two meat inspectors. The inspectors, in turn, had been convicted of accepting bribes from other companies. The Animal and Public Health Inspection Service of the Department of Agriculture had commenced administrative proceedings to withdraw federal inspection services from Columbia. In effect withdrawal would put the company out of business. Columbia's defence to the administrative proceeding was that it had been a victim of extortion by the inspectors. It sought under the FOIA the Department's complete personnel files on the inspectors. The trial court ruled in favour of disclosure, balancing the

(cont'd)

Most of the reported cases where a person in litigation with an agency has made an FOIA request have involved requests for investigatory records. In such cases the pendency of the litigation has proven a positive disadvantage in the FOIA suit because courts are almost automatically willing to assume that where an enforcement proceeding is pending, then disclosure of investigatory records would "interfere with enforcement proceedings", in the language of FOIA exemption 7(A).[362] Furthermore, in an SEC injunctive action it has been held that transcripts of witness statements taken by the Commission's enforcement attorneys in the course of a formal investigation are attorneys' work-product under the rule of Hickman v. Taylor and thus exempt from discovery.[363]

361 (cont'd) inspectors' rights of privacy against the public interest in just resolution of the administrative proceeding. The Court of Appeals affirmed but stated that the district court had misstated the interest in favour of disclosure. It was held to be rather the public interest in knowing whether the Agriculture Department itself was in any way culpable for the bribery that had been taking place.

362 See cases cited supra note 357.

363 SEC v. Allegheny Beverage Corp., [1973] C.C.H. Fed. Sec. L. Rep. para. 94 183 (D.D.C.). Even assuming that investigatory transcripts are gathered "in anticipation of litigation" so as to qualify for the privilege, covering them with the privilege seems a bit too favourable to the Government since private attorneys in preparing for litigation do not enjoy the SEC's subpoena power.

In contrast to the OSC, a major portion of the SEC's enforcement activities centers around suits for injunctive relief.[364] Generally, in discovery in an injunctive action the SEC is willing voluntarily to disclose all investigative transcripts compiled in the investigation preceding the filing of the complaint. Such disclosure would very likely not be made, however, where criminal enforcement proceedings were also contemplated. Nor, in such a case, would an FOIA request be honoured;[365] the requestor would be remitted to his limited discovery rights under the Federal Rules of Criminal Procedure.[366]

In SEC administrative proceedings, the rules for discovery are also quite limited; they are in fact analogous to discovery in federal criminal cases. After the Enforcement Division has examined a witness on direct examination, any prior statements of that witness in the possession of the Commission will be ordered produced.[367] In a release disposing of an FOIA request for investigative materials by parties to a disciplinary proceeding,[368] the Commission refused

364 Injunctive relief is provided for under Securities Act of 1933, s. 20(b), 15 U.S.C. s. 77t(b) and Securities Exchange Act of 1934, s. 21(d), 15 U.S.C. s. 78u(d). The OSC may apply to the High Court for an order for compliance, but it almost never does so. Securities Act, s. 143; Bill 7, s. 122.

365 E.g., In the Matter of the Request of Lloyd W. Sahley, SEC FOIA Release No. 4, April 24, 1975.

366 Supra note 358.

367 17 C.F.R. 201.11.1 (1978).

368 In the Matter of the Request of Robert C. Anton and Lambert Hirsheimer, SEC FOIA Release No. 20, July 22, 1975.

disclosure, thereby limiting requestors to the limited discovery available under the Commission's Rules of Practice.

If, as would seem must be the case, a party involved in administrative litigation with an agency has no <u>less</u> a claim to <u>FOIA</u> disclosure than anybody else, and if the <u>FOIA</u> would provide the party with disclosure of materials helpful to his position in the litigation but which would not be available under relevant discovery rules, then it is important to consider whether a court handling an <u>FOIA</u> suit may enjoin the administrative proceedings pending resolution of the <u>FOIA</u> claim. The Supreme Court has said that the federal district courts have such a power as part of their general equitable powers but that it should be used very sparingly.[369] In an <u>FOIA</u> case collateral to an SEC disciplinary proceeding against a registrant, a court refused to enjoin the administrative proceeding pending resolution of the FOIA claim.[370]

Prof. Davis proposes that federal courts conducting civil or criminal trials involving a U.S. government agency should be prepared also to resolve <u>FOIA</u> disputes arising out of requests for disclosure of

369 <u>Renegotiation Board v. Bannercraft Clothing Co., Inc.</u>, 415 U.S. 1, 18-26 (1974).

370 <u>Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. SEC</u>, [1975-76] CCH Fed. Sec. L. Rep. para. 95, 566, 39 Ad. L. 2d 254 (D.D.C., 1976).

material relevant to the main litigation,[371] and some courts have done so.[372]

371 Treatise, *supra* note 276, at 327.

372 *U.S. v. Brown*, 562 F. 2d 1144, 1151-52 (9th Cir., 1977); *U.S. v. Wahlin*, 384 F. Supp. 43 (W.D. Wis., 1974); *Christy v. U.S.*, 68 F.R.D. 375 (N.D. Tex., 1975).

## CONCLUSIONS

The Ontario Securities Commission appears to be a highly responsible administrative agency; it is staffed with persons of integrity, intelligence and a strong dedication to the public interest in honest securities markets. More germane to this paper, it is a relatively open agency. By and large its governing law, regulations and policies are reasonably accessible; it does a good job of making available to the public those documents filed by issuers the availability of which is central to the scheme of securities regulation; its disciplinary proceedings are conducted fairly; its rule-making proceedings are open and public. Although this view must be highly impressionistic since I do not have intimate familiarity with other Ontario administrative agencies, it appears that the OSC must rank near the top in terms of the openness of its procedures. Certainly this conclusion is borne out by comparative reference to Professor Ison's paper on the Workmen's Compensation Board.[373] Many of the practices of the Ontario Securities Commission in dissemination of law and other information could serve as a model for other agencies. There are, however, numerous improvements that could be made by the OSC.

Although in most disciplinary proceedings it appears that counsel representing the Commission make fairly generous voluntary, informal

373 T.G. Ison, Information Access and the Workmen's Compensation Board (1979), Research Publication 4, Commission on Freedom of Information and Individual Privacy.

discovery of the Commission's case, it does not appear satisfactory to leave discovery totally on an informal and non-mandated basis. I would prefer regulations providing for discovery as of right, perhaps not full discovery that is limited only by a relevance standard, but at least discovery as of right of witness names and statements and of documents that Commission counsel plans to introduce into evidence in the proceedings. This would mean discovery as of right of that material which, as I understand it, Commission counsel is now generally prepared to make on a voluntary basis. Such a right to discovery reduced to regulation would go beyond present rules of Canadian criminal procedure and also beyond the discovery provided for by the rules of the Securities and Exchange Commission. Of course the fact that ground would be broken is not an argument against breaking it. The hardest question to resolve in this area is how freely respondents' counsel should be able to roam through a given investigatory file, granted that a single investigation will produce much material not related or only tangentially related to the issues of a given disciplinary proceeding. Ultimately, I believe that in order to protect enforcement objectives beyond the particular disciplinary proceeding and in order also to protect individual privacy, the Commission staff must be permitted to make the determinations of what material gathered in a single investigation is relevant to a particular disciplinary proceeding. But relevance is a broader notion than simply what the staff intends to introduce into evidence. There may be exculpatory evidence, and even where that is not the case, a respondent's counsel may well find fruitful leads not

pursued by the staff in its investigation. If in a particular case a bona fide dispute arose between counsel for the respondent and Commission counsel concerning the scope of discovery, the Commission itself should be able to resolve the dispute in some sort of interlocutary motions practice.

In connection with disclosure of investigatory files generally, the Commission will naturally be concerned to preserve its access to various police records to which it might not have access if the police sources feared disclosure in the hands of the OSC. At the same time, it is my understanding that the types of materials in the possession of the OSC do not raise serious problems of the protection of informers' identities or of their physical safety.

By providing that a Commission member who receives a report of a formal investigation and who orders disciplinary proceedings to be initiated may not sit in the adjudication thereof, Bill 7 has gone a long way toward resolving the preknowledge problem that arises in the administrative agency from the combination of investigatory, prosecutorial and adjudicative functions. At the same time, I would prefer a more general rule that whatever reports on a particular matter from an informal or a formal investigation are available to the commissioners sitting in an adjudicative capacity must be equally available to the respondent or his counsel. Finally, in connection with disciplinary proceedings, I am uncomfortable at the appearance, if not the reality, of bias that arises in hearings before the Deputy

Director-Registration in the contexts of the annual renewal of salesmen's licences and applications for permission to change employers. The Deputy Director-Registration is much too closely involved with the day-to-day regulation of licensees in the small world of the Ontario investment industry to be an appropriate hearing officer in such cases.

In connection with the submission of recommendations to the Lieutenant Governor in Council for the issuance of formal rules and in connection with the promulgation of policy statements, the OSC publishes advance notice of topics for consideration, asks for submissions and sometimes holds public hearings. These procedures make the Commission practically a model of open government in the rule-making context. As for the Commission's willingness to receive secret submissions, I reluctantly conclude that it is the lesser evil than that of not receiving any submissions from persons who are unwilling to make them public. The Commission receives such secret submissions in the interests of fully informed rule-making. To some extent, however, secret submissions cut against fully informed rule-making since the purpose of the open rule-making procedures is to promote debate among interested parties, and one cannot debate the merits of submissions of which one is ignorant.

There is, however, a kind of informal law-making that goes on at the OSC that is no model of openness or even of tolerable administrative practice. Such informal law-making occurs when exemptions from one

or another of the Securities Act's provisions are granted orally. Grants or exemptions are statements of policy by the agency. They are its law, and they should be public. Orally granted exemptions are as much the law as the published section 59 orders exempting issuers from the prospectus and registration requirements, and they are as much the law as the SEC's no-action letters. In fact, the OSC's oral exemptions are more "law" than the SEC's no-action letters since the former are usually granted by commissioners and the latter only by staff.

Furthermore, the kind of informal law-making that goes on between the Commission and the Exchange when, for example, the Commission pressures the Exchange into adopting rules for take-over bids made on the Exchange, should be made public on a systematic basis. No one would doubt that "law" emerges from this kind of interchange. The private nature of the pressure applied in these instances seems peculiarly inappropriate because the Securities Act itself seems to contemplate visible proceedings. If the Commission, in the take-over bid regulation area, had proceeded under section 140(2) which empowers it to make "any direction, order, determination or ruling, (a) with respect to the manner in which any stock exchange in Ontario carries on business", it almost certainly would have proceeded by way of public hearing, as it has done in the commission rate area. And in the take-over bid area, especially, it is difficult to find any jurisdiction for the Commission to intervene in the Exchange's affairs apart from section 140(2). The purpose of the Commission's intervention was to force the Exchange to adopt regulations so that

certain Exchange transactions could continue to enjoy an exemption from Securities Act provisions that the Act itself in clear terms granted without requiring such regulations.

It would be foolhardy to attempt to discourage informal interaction between representatives of an expert agency and its regulatees. Nonetheless, there is a point where the informal interactions amount to an understanding between the parties of what is the law of a particular situation. Such understandings must be publicly memorialized. In addition, and more generally, granted that privacy in a variety of informal interactions is appropriate, perhaps there should be public access to some form of appointment book or log of the daily activities of agency members.

The OSC does an admirable job of publishing its decisions and written orders in formal proceedings. There are hundreds of such published opinions arising mostly in disciplinary proceedings. These decisions should be indexed by the Commission. If they were, they would be more readily accessible to interested parties than at present.[374] The Commission seems to take the position that its adjudications in discipinary proceedings do not constitute precedent for other proceedings. That seems a very odd position indeed. How can the

374 There is a useful index of OSC decisions published by the Law Society's Department of Continuing Education, N.M. Chorney, Index to Canadian Securities Cases (1975), but it goes through 1974 only.

collective wisdom and expertise built up over the years in case after case not serve as a guide for appropriate dispositions in the future? Indeed, if the precedential nature of disciplinary decisions were openly acknowledged, and if the decisions were more accessible to all by being indexed, then we might see more uniformity in sanctioning than is present currently. That would be desirable.

If freedom of information legislation is adopted in Ontario, then it is almost certain that we will end up not only with more disclosure about the activities of the government but also with more disclosure of the activities of businesses. In fact, greater disclosure about businesses, particularly large corporations, is an aspect of freedom of information legislation that earns it support in the press.[375] It is not nearly so evident that freedom of information legislation would result in greater disclosure about the affairs of private citizens. This is true because it would seem likely that any such legislation would be accompanied by privacy legislation that would protect individual privacy interests and also because there is probably a public consensus about the need to protect individual privacy against big government's information collection activities. This latter consensus may well exist to a greater degree than that which would favour freedom of information legislation itself. In any

375 See, e.g., "Washington Welcome", Financial Post, June 3, 1973, p. 2, col. 1; "The Washington Connection" (editorial), Globe & Mail, January 10, 1979, p. 6, col. 1.

case, any legislation which obligates the government broadly to disclose will obligate it to disclose a great deal of commercial information since much of the activity of government agencies is in collecting such information. The OSC is a quintessential example.

The purpose of freedom of information legislation, however, is not disclosure about the affairs of corporations but rather disclosure about the affairs of government itself. The questions of what is an appropriate amount of disclosure by the government and what is an appropriate amount of disclosure by private businesses are distinct. Government does not have proprietary interests to protect even if it is the shareholder of corporations that do. In general, I would prefer to leave the issue of corporations' obligations to make public disclosure of their affairs to be resolved by companies and securities acts, as is done presently. That is not to say that our present statutes have mandated the optimum level of public disclosure,[376] but it is to underscore the conceptual separateness of the issues of government disclosure and corporate disclosure.

To the extent that more disclosure by the government will of necessity result in more disclosure about corporations, it is certainly necessary to protect that corporate information, disclosure of which would damage the legitimate business activities of the firm or which

376 See, e.g., J.A. Kazanjian, Corporate Disclosure (1976), Study No. 18 for the Royal Commission on Corporate Concentration.

would damage the competitive process in industry more generally. But there lurks here a very complicated question which has not been satisfactorily addressed by Canadian courts in connection with the granting of exemptions from the disclosure provisions of companies and securities acts. To what extent does disclosure of information about a corporation, especially its profit margins on a single product and its costs of manufacture, enable its competitors to take "unfair" advantage of the disclosing corporation? Is the answer dependent on whether all of the corporations in the particular industry face equal disclosure obligations? Is the competitive damage that one competitor, armed with certain information, may do to the other in fact "unfair" or is it part of a general competitive process that is ordinarily encouraged, for example, by combines legislation? If a by-product of freedom of information legislation is more disclosure about the affairs of businesses, it is not necessarily true that every time one business seeks under the legislation information emanating from a competitor there is some devious purpose. As government regulates private enterprise more and more closely, individual businesses will have a greater and greater interest in attempting to guarantee that the regulation is in fact equal as between competitors. They will have a legitimate interest in knowing, in other words, that regulation has been applied in an impartial manner to similar fact situations involving different firms.

Were freedom of information legislation to be enacted, one ought not anticipate a public stampede to the offices of the OSC in search of

disclosure. Judging from the submissions made in connection with rule-making, it would appear that very few persons outside those in the industry and their representatives and perhaps a few academics have much interest in the topic of securities regulation. The work of the OSC simply does not have the immediate impact on masses of citizens that the Workmen's Compensation Board or the Labour Relations Board has.

If freedom of information legislation were to be adopted in Ontario, we have some things to learn and some to learn to avoid from the American experience. The Freedom of Information Act in that country has incorporated roughly the correct exemptions and has incorporated what I believe to be the only effective mechanism for promoting disclosure -- judicial review. It is hard to imagine meaningful freedom of information legislation that would leave the ultimate authority to determine the applicability of an exemption within the government itself. The courts are independent of the government in theory and in fact, as their increasing boldness in the matter of Crown privilege attests.

It is not apparent, however, again commenting in relation to the American legislation, that the need of the particular requestor should uniformly be ignored in a disclosure statute. To make a very rough distinction, it would seem appropriate that where the information sought originates in and concerns the processes of the government, then the requestor should not be obliged to establish a special

interest in or need for the information in order to obtain it. In such a case, need inheres in the requestor's status as citizen. Where, however, the disclosure sought from the government is of information emanating originally from private parties, corporate or individual, then in determining the propriety of disclosure it may well be appropriate to assess the nature of the requestor's interest in the information. Furthermore, disclosure of commercial information to one person would not necessarily mean that the government was obligated to make disclosure to all.

Canadian legislation should in my view be more careful than the American to ensure a congruence between provisions of the freedom of information statute and the secrecy provisions of other statutes. In some cases this congruence will have to be achieved not through the freedom of information legislation but by amendment to those other statutes. It has become an excessively complicated question in American freedom of information jurisprudence to determine what particular statutory secrecy provisions permit non-disclosure under the Freedom of Information Act. Also it is hoped that new legislation would deal explicitly with the question of the standing of the submitters of information as parties in actions to prevent the government's disclosure thereof. Finally, I do not believe that the government's internal, policy-making memoranda are necessarily entitled to a broad general protection in all cases on a theory that disclosure would force the government to operate in a "goldfish bowl" or that it would necessarily and in all cases be a bad thing for the

government to do so. We should move toward a rule that would protect internal memoranda during the currency as a policy problem of the issue or issues to which they relate. In this connection, moreover, numerous distinctions will have to be drawn between different types of internal government documents. American courts have been too generous and too indiscriminate in exempting from disclosure internal policy-making memoranda.

Based on the experience of the Securities and Exchange Commission, excessive dollar cost is not a good reason not to enact freedom of information legislation. For the calendar year 1976, the SEC's net cost of administration of the Freedom of Information Act (that is, costs not compensated by user fees) were in the neighbourhood of $400,000.[377] That amounts to about seven-tenths of one percent of the Commission's total budget for that year of approximately $60 million.

The activities of the Ontario Securities Commission do not seem to me to be subject to very effective oversight either by Cabinet itself or by the Legislature. This results from the fact that there is a dearth of people in the government outside the Commission itself with sufficient expertise in securities matters to serve as a check upon

377 H.C. Relyea, The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1976 (Library of Congress, Congressional Research Service, No. 77-228G), at 48.

the Commission's activities. In the case of the Legislature, its inability to make effective oversight of the Commission may result in addition from the structural fact that in our system the Executive has a very strong control over the Legislature. It would seem, therefore, looking at freedom of information with respect only to the Securities Commission, that there might be even greater utility in such legislation in Ontario than there is in the United States.

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